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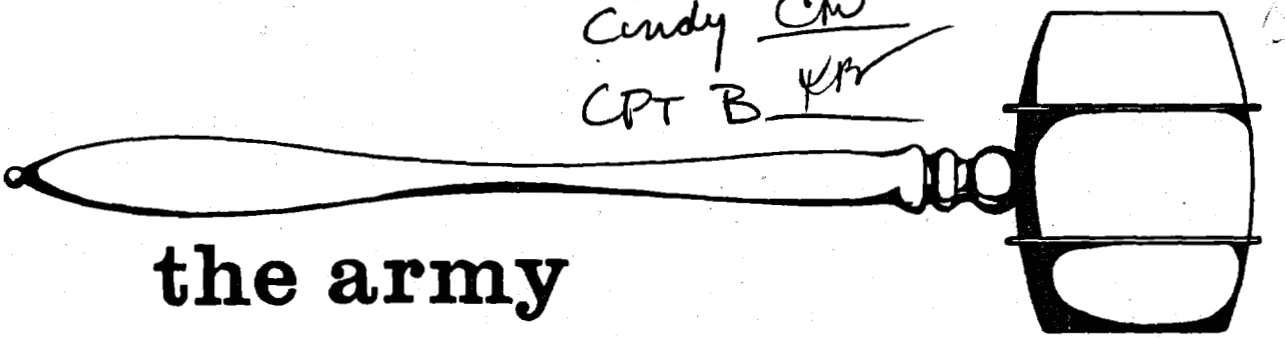

the army LAWYER

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"We Find the Accused (Guilty) (Not Guilty) of Homicide": Toward a New Definition of Death

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From time immemorial, the heart has been considered to be the center of human existence. Not surprisingly, therefore, was the reliance of the law on the stoppage of the heart as the most reliable talisman of the cessation of life. More recently, however, in an effort to reflect developments in medical technology, both the legislatures and the courts have sought to evolve a new legal definition of death. It is the purpose of this article to study the various approaches to this question and propose a suggested reconciliation of these new developments with traditional common law concepts.

The Scenario

Specialist Four Smith has just learned that another member of his squad, Specialist Four Jones, was having an affair with Mrs. Smith. Consequently, on 25 November 1979, Smith armed himself with a tire iron and lay in wait outside of the Jones' quarters which are located on a military installation. When Jones arrived home, Smith pounced upon him and beat him repeatedly on the head with the tire iron. A neighbor observed the assault and phoned both the military police and an ambulance. Smith

was apprehended and Jones was transported to the nearest hospital and placed on an artificial life support system. After several days and despite repeated efforts to revive the patient, the attending neurosurgeon makes one of two prognoses. Jones is either diagnosed as being in a "vegetative"[1] state or as having suffered a "brain death."[2] In any event, after consultation with other physicians and members of the Jones family, the decision is made to remove Jones from the respirator. All life support systems are then disconnected. Jones' heart continues to beat for ten minutes; subsequently, Jones expires. The issue is thus posed: Did Jones "die" before or after he was removed from the respirator, and if he "died" after its removal, whether Smith can lawfully be convicted for the homicide of Jones. The resolution of these issues requires a study of the development of medical technology, the law, and the efforts of the latter to catch up with the former.

Attorney, Heal Thyself

At common law, a person was deemed to be dead only upon "a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc."[3] Thus, as long as the heart beat and one was breathing, one was deemed to be "alive." Further, if the victim of an assault was to survive under these conditions for a year and a day following the attack, then the assailant could not be convicted for any ensuing death of the victim.[4] Medical technology, however, has outstripped these simplistic axioms and rendered them obsolete. Artificial life support systems have enabled the medical profession to prolong human "life," as defined by archiac common law standards, almost indefinitely.[5] Both medical and legal minds were thus pressed to redetermine when a person dies.

[1] *See* text accompanying notes 21-23, *infra*. *See also* Schneck, *Brain Death and Prolonged States of Impaired Responsiveness*, 58 Denv. L.J. 627 (1981).

[2] *See* text accompanying notes 7-19 *infra*.

[3] Black's Law Dictionary 488 (4th Rev. Ed. 1974).

[4] *See* Commonwealth v. Pinnick, 354 Mass. 13, 15 n. 1, 234 N.E.2d 756, 757 n. 1 (1966). More recently, however, labelling it as "senselessly indulgent toward homicidal malefactors," Massachusetts has now abandoned the "year and a day" rule. Commonwealth v. Lewis, 28 Crim. L. Rep (BNA) 2032, 2033 (Mass. 1980), as have Pennsylvania, Commonwealth v. Ladd, 402 Pa. 164 (1960), and New Jersey, State v. Young, 77 N.J. 245 (1978).

[5] The most widely known of artificial life support systems, the respirator, is designed to guarantee the nearly perpetual "breathing" of the patient. The respirator

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The Statutes

Having created this conundrum, it was the doctors, spurred largely by desires to shield themselves from civil and criminal liability for the expiration of patients removed from artificial life support systems,[6] who first rushed to solve it. Laboring throughout 1967 and 1968, an Ad Hoc Committee of the Harvard Medical School, consisting of ten physicians, an historian, an attorney, and a theologian, sought to evolve a new definition of death which would focus on the brain, rather than the heart, as the most reliable indicia of death. Consequently, death was defined as the irreversible cessation of all functioning of the brain, as evidenced by an unresponsiveness to normally painful stimuli, an absence of spontaneous movement or respiration, and an absence of reflexes. This diagnosis was to be made in accordance with reasonable medical standards and confirmed by the results of two separate electroencyphlograms (EEGs) administered twenty-four hours apart and registering "flat" or "isoelectric" readings.[7] When the above criteria have been satisfied, the patient could be declared dead and removed from all artificial life support systems.[8]

Regrettably, for several years, the law remained dormant. It was not until 1971, in the midst of the controversy surrounding the Karen Ann Quinlan case,[9] that Kansas became the first state to redefine death.[10] Statutorily, borrowing heavily from the Harvard criteria, the law required that death be determined and declared prior to the removal of the respirator.[11] Once the dam was cracked, a deluge of "brain death" statutes were enacted.[12]

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delivers a given volume of air to the lungs at a set rate. Periodically a larger measured, or "sigh," volume of air is inserted in order to purge the lungs of excretions.

[6] Indeed, several of the statutory redefinitions of death were due in large part to the lobbying efforts of the medical profession. *See, e.g.*, Gov. Msg. No 318, *reprinted in* 1978 Senate Journal (Hawaii), at 708–09; Comment, 14 Wake Forest L. Rev. 771, 784–85 (1978).

[7] An electroencyphlogram measures the degree of electrical activity generated within the brain by chemical reactions among the millions of nerve cells, or neurons, located therein. A series of electrodes are attached to or inserted into the scalp and detect the rhythmic brain activity. These impulses are magnified and transmitted to an electromagnet which records them on paper. A normal, or "alpha," rhythm is indicated if regular waves occurring eight to twelve times, or cycles, per second are recorded. In instances of injury to the brain, the wave forms slower than the alpha rhythm. A "flat" or "isoelectric" reading denotes an absence of activity within the brain. I. Cooper, Living With Chronic Neurological Disease 124–25 (1976). *See also* McGraw-Hill Encyclopedia of Science and Technology 478–79 (1966). Subsequent scholarship has suggested that electrocerebral silence rather than isoelectric EEG readings be required in order to determine death. *See* Lovato v. District Court, 601 P.2d 1072, 1077 (Colo. 1979), *discussed in* Lovato v. District Court: *The Dilemma of Defining Death*, 58 Denv. L.J. 627 (1981).

[8] Report of the Ad Hoc Committee of the Harvard Medical School, 205 J.A.M.A. 337 (1968), *discussed in* Note, *The Citadel for the Human Cadaver: The Harvard Brain Death Criteria Exhumed*, 32 U. Fla. L. Rev. 275 (1980).

[9] *See* text accompanying notes 20–28, *infra*.

[10] Kan. Stat § 77–202 (Supp. 1976)

[11] The statute provides that a person will be considered dead if, in the opinion of physicians based upon ordinary standards of medical practice, there is an absence in the patient of spontaneous respiratory and cardiac function and resuscitation is deemed hopeless; the traditional standard of death is thus paid homage. Additionally, however, death is defined as the absence of spontaneous brain function *and* a medical determination made during the attempted resuscitation of the circulatory or respiratory systems in the absence of brain function that further attempts at resuscitation would not succeed. Death occurs when the two conditions coincide and must be pronounced prior to the removal of the artificial life support systems. *Id.* The statute was first tested in a homicide case in which the victim was diagnosed by a neurosurgeon to have suffered "irreversible brain damage" and, after consultation with the family, was removed from the respirator. The victim's kidneys were then used for transplant. Paranthetically noting that, even if the neurosurgeon was wrong, it is no defense to homicide that death was contributed to or caused by the simple negligence of a physician, the court sustained the conviction and upheld the statute. State v. Shaffer, 223 Kan. 224, 249, 574 P.2d 205, 210 (1977).

[12] *See, e.g.*, Alaska Stat. § 09.65.120 (1981); Ark. Stat. Ann. § 82–537 (1981 Cum. Supp.); Cal. Health and Safety Code § 7180 (West 1981–82 Cum. Supp.); Ga. Code § 88–1715.1 (1979); Haw. Rev. Stat. § 327C

A mad swirl of activity ensued wherein the American Medical Association, the American Bar Association, and the National Conference of Commissioners on Uniform State Laws each drafted proposed redefinitions of death. Each required an irreversible cessation of total brain function as a prerequisite for the pronouncement of death.[13] In 1979, as a result of the joint effort of these organizations, a "Uniform Determination of Death Act" was proposed. The model act provides that:

> An individual who has sustained either (1) irreversible cessation of circulatory and respiratory function, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.[14]

To date, the model statute has been adopted only judicially and by only one state.[15]

The Common Law

In those states in which legislation was not forthcoming, the common law at last rose to the occasion. In this regard, the courts adopted two distinct approaches to the issue. The Supreme Judicial Court of Massachusetts typified one solution to the question of brain death in the case of *Commonwealth v. Goldston.*[16] In *Goldston,* the victim had been beat about the head with a baseball bat and, while attached to the respirator, was diagnosed to have suffered a brain death. This diagnosis was confirmed by two isoelectric or flat EEGs. The respirator was thereafter disconnected and, at trial, the accused was held responsible for the ensuing expiration of the victim. The appellate court affirmed the conviction. Elaborating upon the traditional definition of death, the court noted that "death does not occur until the heart has stopped long enough that there is a complete loss of brain function."[17] This definition was further given a judicial gloss whereby any reference to "respiration" or "pulsation" was deemed to refer to *spontaneous* bodily activity rather than activity assisted or made possible

(1981 Supp.); Idaho Code § 54-1819 (1979); Ill. Rev. Stat. ch.110 1/2, ¶ 302 (1981-82 Supp.); Iowa Code § 702.8 (1979); Md. Pub. Health Code Ann. art. 43, § 54F (1980); Mich. Comp. Laws § 14.228(2) (1981); Mont. Code Ann. § 69-7201 (1977 Cum. Supp.); N.M. Stat. Ann. § 12-2-4 (1978); N.C. Gen. Stat. § 90-322 (1981 Cum. Supp.); Okla. Stat. tit. 63, § 1-301 (g) (1981); Or. Rev. Stat. § 146.001 (1979); Tenn. Code Ann. § 53-459 (1977); Va. Code § 54-325.7 (1981 Cum. Supp.); W. Va. Code § 16-19-1 (1979); Wyo. Stat. § 35-19-101 (1979 Supp.). A breakdown of the subtle distinctions amongst these statutes is provided in Horan, *Definition of Death: An Emerging Consensus,* Trial, December 1980, at 22. For civil law purposes, the military follows state law in determining whether to halt life support systems: *See* Army Reg. No. 40-3, Medical Services: Medical, Dental, and Veterinary Care, para. 2-24*d* (1 Dec. 1977).

[13] The American Medical Association's version states:

> A physician, in the exercise of his professional judgment, may declare an individual dead in accordance with accepted medical standards. Such declaration may be based solely on an irreversible cessation of brain function.

The American Bar Association's (ABA) proposal reads:

> For all legal purposes, a human body with irreversible cessation of total brain function, according to the usual and customary standards of medical practice, shall be considered dead.

The ABA model has been adopted for use by the Montana and Tennessee legislatures. *See* Mont. Rev. Code Ann. § 50-22-101; Tenn. Code Ann. § 53-459. The National Commissioners proposed that:

> For legal and medical purposes, an individual with irreversible cessation of all functioning of the brain, including the brain stem, is dead. Determination of death under this act shall be made in accordance with reasonable medical standards.

This "Uniform Brain Death Act" has been adopted judicially in Colorado, Lovato v. District Court, 601 P.2d 1072 (Colo. 1979), and legislatively in Nevada, Nev. Stats. ch 451 (S.B. No. 5, ch 162, Sixtieth Session, 1979). *See generally,* McCabe, *The New Determination of Death Act,* 67 A.B.A.J. 1476 (1981); Horan, *supra* note 12, at 25.

[14] *Id.* at 25-26.

[15] *In re* Bowman, 94 Wash. 2d 407, 617 P.2d 731 (1980). *See* discussion in Brennan & Delgado, *Death: Multiple Definitions or a Single Standard,* 58 S. Cal. L. Rev. 1323 (1981).

[16] 372 Mass. 249, 366 N.E.2d 744 (1977), *cert. denied,* 434 U.S. 1039 (1978).

[17] *Id.* at 252, 366 N.E.2d at 747.

entirely by artificial means.[18] In *Goldston*, the expert testimony indicated that the victim had clearly satisfied the Harvard criteria prior to the removal of the respirator.[19] Hence, the accused was properly held accountable for the death of the victim.

Left unanswered by *Goldston*, however, is the question posed by such cases as that of Miss Karen Ann Quinlan.[20] In that case, Mr. Joseph Quinlan, Miss Quinlan's father, sought to be appointed as her guardian and requested that the letters of guardianship expressly grant him the power to have discontinued all extraordinary procedures then being employed to sustain his daughter's vital processes. Miss Quinlan was then attached to a respirator and diagnosed as being in a "chronic persistent vegetative state," *i.e.* she had a capacity to maintain the vegetative portion of the neurological function including the ability to breathe, sleep, waken, chew, swallow, and maintain an appropriate heart beat and blood pressure.[21] Her brain was, however, unable to regulate sapient activity, *i.e.* the ability to talk, see, feel, sing, and think. Electroencyphlogramic testing revealed some activity, albeit abnormal, within the brain.[22] At trial, the medical testimony was clear: Miss Quinlan had not suffered a "brain death" within the meaning of the Harvard criteria and her removal from artificial life support systems, under these conditions, would not conform to regular medical practices, standards, and traditions.[23] Thus, under the statutory or *Goldston* formulae, Miss Quinlan was "alive."

Nonetheless, the New Jersey Supreme Court granted the relief sought. Recognizing a constitutional right to privacy,[24] the court found this right broad enough to include the ability of a patient, under certain conditions, to refuse medical treatment.[25] The panel asserted that "[w]e have no hesitancy in deciding ... that no external compelling interest of the State would compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility to returning to any semblance of cognitive or sapient life."[26] The proffered state interest in the "preservation and sanctity of human life and defense of the right of the physician to administer medical treatment according to his best judgment ... weakens and the individual's right to privacy grows as the degree of bodily invasion increases and

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[18] *Id.*

[19] The Harvard criteria have also been noted with approval by courts in New York, New York City Health & Hosp. Corp. v. Sulsona, 81 Misc.2d 1002; 367 N.Y.S.2d 686 (Sup. Ct. Bronx County 1975); New Jersey, *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); and Arizona, State v. Fiero, 124 Ariz. 182, 603 P.2d 74 (1979). Inasmuch as the decision to remove the patient from the respirator must be made within the bounds of the ordinary standards of medical practice, expert testimony concerning those standards has been held to be a *sine qua non* to providing satisfaction of the Harvard criteria. *See* State v. Fiero, 124 Ariz. 182, 185, 603 P.2d 74, 77 (1979); People v. Saldana, 47 Cal. App. 3d 954 (Ct. App. 2d Dist. 1975).

[20] *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

[21] *Id.* at 17, 355 A.2d at 654. Miss Quinlan was deemed to be comatose and engaged in a "sleep-awake cycle" wherein she would, at times, exhibit a sleeplike unresponsiveness to outside stimuli. On other occasions, she would cry out, blink, grimace, react to light or movement, and chew while being unaware of the nature of the stimulis. *Id.* at 17–18, 355 A.2d at 654–55.

[22] *Id.* at 17, 355 A.2d at 654.

[23] *Id.* at 17, 18; 355 A.2d at 654, 655.

[24] Initially, the court gave short shrift to two other bases for relief proposed by the Quinlans. The court found no impingement upon the religious beliefs of the family, nor an imposition of cruel and unusual punishment upon Miss Quinlan by the refusal of the state to permit her removal from the respirator. *Id.* at 24–25; 355 A.2d at 661–62.

[25] *Id.* at 26; 355 A.2d at 663. This right to privacy was found to be grounded in the U.S. Supreme Court decision in Griswold v. Connecticut, 381 U.S. 479 (1965), in which a state statute prohibiting the use of contraceptive devices by married couples was ruled unconstitutional as violative of marital privacy with respect to fundamental family planning decisions, and was analogized to Roe v. Wade, 401 U.S. 113 (1973), in which the Court utilized the right to privacy in order to recognize the right of the pregnant woman to obtain an abortion. 70 N.J. at 26, 355 A.2d at 663.

[26] *Id.*

the prognosis dims."[27] Although this right to refuse medical treatment was deemed to be personal to the patient, Mr. Quinlan, as the guardian of his daughter, was permitted to exercise it on her behalf.[28] To this day, Miss Quinlan has survived the removal of the respirator.

If, as in our scenario, Miss Quinlan's condition had been caused by foul play and, as Specialist Jones, she had not survived the removal of the respirator, the question is posed as to whether her assailant could be held accountable for her death. Under the *Goldston* ruling, absent a complete loss of brain function,[29] a conviction might only be had for aggravated assault or attempted murder, as appropriate. "Death" would be deemed to have occurred *after* the removal of the respirator.

At this point, the second line of judicial decisions would fill the void. In *State v. Johnson*,[30] the accused twice battered his victim on the head with a shotgun. While attached to the respirator, the victim suffered a cessation of brain activity. After appropriate consultations, he was removed from the life support systems and pronounced dead. Over his protests that the doctors, not he, had caused the death of the victim, the accused was convicted of homicide.[31]

On appeal, the conviction was affirmed. The Ohio appellate court cited the common law rule that one who inflicts injury upon another is responsible for the ensuing death unless gross or willful misconduct by medical personnel constituted an intervening cause.[32] At trial, the testimony concerning the cause of death unanimously pointed to the severe head trauma as a result of an extensive skull fracture as the reason for the demise of the victim; there was no evidence of medical malpractice.[33] Consequently, the court held that the issue was not the *time* of death, but rather the *cause* of death. As a question of causation, it was properly submitted to the jury for resolution.[34] In this case, the jury obviously determined that the accused caused the death of his victim.

Under this approach, the accused could be held liable for the death of the victim even if brain death had *not* occurred prior to the removal of the respirator and even if the decision of the physicians to disconnect the victim from the respirator was made with ordinary negligence.[35] This concept is not alien to military law. In *United States v. Schreiber*,[36] the Court of Military Appeals adopted the rule that, if a charge involving homicide is to be sustained,

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[27] *Id.* at 27, 355 A.2d at 664. *Accord In re* Storar, 48 U.S.L.W. 2650 (N.Y. Ct. App. 1981). *See generally* Note, *Refusal of Life Saving Medical Treatment vs. The State's Interest in the Preservation of Human Life: A Clarification of the Interests at Stake*, 58 Wash. U.L.Q. 85 (1980).

[28] 70 N.J. at 27, 355 A.2d at 664. The court further noted that medical personnel and institutions would not thus be subjected to liability for criminal homicide. It was reasoned that the "ensuing death would not be homicide, but rather expiration from existing natural causes." Further, if the death were deemed to constitute a homicide, it would not be unlawful as the exercise of a constitutional right is protected from criminal prosecution. *Id.* at 32-33, 355 A.2d at 669-70 (citing Stanley v. Georgia, 394 U.S. 557 (1972)).

[29] *See* text accompanying notes 16-19 *supra*.

[30] 56 Ohio St. 2d 35, 381 N.E.2d 637 (1978).

[31] *Id.* at 38, 381 N.E.2d at 640.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 39, 381 N.E.2d at 641.

[35] *Accord* Matter of J.N., 406 A.2d 1275 (D.C. 1979); State v. Holsclaw, 42 N.C. App. 696, 257 S.E.2d 650 (N.C. Ct. App.), *petition denied*, 298 N.C. 571, 261 S.E.2d 126 (1979). The *Holsclaw* court noted the existence of the North Carolina definition of death, *see* N.C. Gen. Stat. § 90-322, but ruled that it had no applicability to a criminal proceeding. Rather, the statute was designed to protect from civil and criminal liability the physician who disconnects the patient from the artificial life support system. 42 N.C. App. at 698, 257 S.E.2d at 652. *See also* Comment, 14 Wake Forest L. Rev. 771, 784-85 (1978). The Hawaii statute was apparently enacted for the same purpose. *See* Gov. Msg. No. 318 concerning House Bill No. 258, *reprinted in* 1978 Senate Journal, at 709-09. The Kansas statute, however, was specifically intended to apply to criminal proceedings. State v. Shafter, 223 Kan. 244, 574 P.2d 205 (1977).

[36] 5 C.M.A. 602, 18 C.M.R. 226 (1955).

the act of the accused need only contribute to the death of the victim.[37] To be relieved of this responsibility, an intervening cause such as "intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and could not have been reasonably anticipated"[38] must affirmatively be established by the accused. Subsequent case law has determined that simple negligence by medical personnel does not constitute such an intervening cause.[39] Thus, inasmuch as the attending physician and family of the victim owe no duty to mitigate the offense of the accused,[40] the exercise of the rights afforded the family of the victim by the *Quinlan* case[41] will not preclude a homicide conviction.

A Suggested Approach

These two views are reconcilable. If the victim is found to have suffered brain death according to the Harvard criteria prior to the removal of the respirator, the *Goldston* case indicates that a conviction for some degree of homicide may be had. If, however, whether due to negligent medical or family advised decision, the victim is disconnected from the respirator *prior* to suffering an irreversible cessation of brain function, then the accused may be convicted of homicide if his acts contributed in a material degree to the resultant death and there is no evidence of a substantial intervening cause. Ordinary medical negligence is insufficient evidence thereof. As a question of fact, the causation must be decided by the jury. This approach would permit the peaceful coexistence of advanced neurological and traditional common law concepts. In this vein, Specialist Smith would be responsible for the death of his victim whether the victim was removed from the respirator while in a vegetative state or after having suffered an irreversible cessation of brain function. Hopefully, when confronted by the issue, the military courts will adopt such a course.[42]

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[37] *Id.* at 607, 18 C.M.R. at 231. *Accord* United States v. Houghton, 13 C.M.A. 3, 32 C.M.R. 3 (1962). Subsequent case law has elaborated upon this test and required that the act of the accused play a "major" or "material" role in the death of the victim. United States v. Moglia, 3 M.J. 216, 218 (C.M.A. 1977); United States v. Horner, 1 M.J. 227, 230 (C.M.A. 1975).

[38] United States v. King, 4 M.J. 785 (N.C.M.R. 1977). In this regard, the self-injection by the victim of heroin supplied him by the accused has been deemed "foreseeable" such as to render the accused liable for the resulting death. United States v. Moglia, 3 M.J. 216, 217-18 (C.M.A. 1977).

[39] United States v. Eddy, 26 C.M.R. 718 (A.B.R. 1958); United States v. Wilson, 5 C.M.R. 218 (A.B.R.), *petition denied*, 6 C.M.R. 130 (C.M.A. 1952); United States v. Bageux, 2 C.M.R. 424 (A.B.R. 1951), *aff'd*, 2 C.M.A. 306, 8 C.M.R. 106 (1953).

[40] Matter of J.N., 406 A.2d 1275 (D.C. 1979).

[41] *See* text accompanying notes 20-28 *supra*.

[42] It should be noted that military appellate courts are not adverse to promulgating substantive law standards when those standards would bring the military system in line with its civilian counterpart. *See, e.g.*, United States v. Frederick, 3 M.J. 230, 238 (C.M.A. 1977) (adoption of American Law Institute standard for insanity).

Contracting Officer Actons in Cases of Fraud

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30th Graduate Class TJAGSA

Introduction

No issue of government is subject to greater public scrutiny and more justly condemned than the issue of fraud, waste, and abuse in handling the public's purse. This issue provides

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[1] The opinions and conclusions expressed herein are those of the individual author and do not necessarily represent the views of either The Judge Advocate General's School, United States Army, or any other governmental agency.

constant grist for investigative reporters, crusading officials, and private citizens who point out a seemingly never ending series of incidents which both outrage the public and cause legitimate public concern about the efficiency and integrity of government. As a result of these concerns, the federal government has enacted a wide range of civil and criminal remedies to punish wrongdoers and stringent ethical and conflict of interest requirements for public officials, particularly those involved with the acquisition and fiscal process, and has created programs such as the "Hotline" to uncover and report incidents of fraud, waste and abuse.[2]

Contracting officers have a key role in dealing with fraud because they often discover, or are informed by law enforcement officials of, incidents of fraud concerning contracts for which they are responsible. For example, a contracting officer could be informed that a government project engineer had a heretofore unknown "profit sharing" arrangement with a contractor whereby the government engineer would share in the profits of government contracts which the government engineer helped the contractor either obtain or perform. The contracting officer could likewise learn that this project engineer had leaked government estimates and funding limitations on projects prior to bid opening to the contractor or that the engineer had placed "false" requirements in the bid specifications which the contractor knew could be safely ignored in bidding, thus giving a competitive bidding advantage to the contractor. The same project engineer then may have reviewed the bids and recommended awards of the resulting contracts to this contractor. Additionally, the contracting officer could learn that the same project engineer, as contracting officer's representative, had failed to inspect the contractor's work, had allowed the contractor to "cut corners" in complying with the specifications, had suggested possible claims for additional work to the contractor, and then certified those claims as being valid changed work outside the scope of the contract specifications, and had even actually drafted the contractor's claim letters which were submitted to the contracting officer.[3]

Obviously, these facts require the contracting officer to take appropriate actions to protect the interests of the government from further damage by this contractor. This article will discuss the various actions and recommendations that may be available to the contracting officer when it is discovered that similar incidents of fraud have tainted Army contracts. The discussion will not focus upon the criminal and civil remedies controlled by the Department of Justice under statutes such as the False Claims Act but instead will outline the powers and duties of the contracting officer to take administrative action.

Reporting the Fradulent Conduct

When faced with a situation such as set out above, the contracting officer must immediately make appropriate reports of the suspected illegal conduct. In general the Defense Acquisition Regulation (DAR) sets forth reporting requirements for many different types of illegal conduct including collusive bidding,[4] illegal gratuities,[5] illegal kick-backs,[6] contingent fee violations,[7] and false certification of claims.[8] However, the basic reporting mechanism for suspected contract fraud is the debarment/suspension procedure of DAR § 1-608 which sets forth detailed reporting requirements and guidance as to what information should be provided. Those provisions should be followed carefully. Within the Department of the Army, this report must be forwarded to the Assistant

[2] The Department of Defense toll free "Hotline" telephone number is: 800-424-9098.

[3] These are the actual reported acts of fraudulent conduct in the case of K&R Eng'g Co., Inc. v. United States, 616 F.2d 469 (Ct. Cl. 1980).

[4] Defense Acquisition Reg. § 1-111.2 (1 July 1976) [hereinafter cited as DAR].

[5] DAR § 1-111.4.

[6] DAR § 1-111.3.

[7] DAR § 1-508.

[8] DAR § 1-314(g) (28 Aug 1980).

Judge Advocate General for Civil Law.[9] The Army implementation of the DAR provisions specifically requires the prompt reporting of allegations of fraud or criminal conduct in connection with procurement activities when there is "reason to suspect" a violation. "Reason to suspect" is specifically defined as "sufficient information to warrant an inquiry ... by a contracting officer, auditor, inspector, military police criminal investigator, or if the matter has been referred to the Federal Bureau of Investigation. . . ."[10] Thus the obligation to furnish a report requires only a low level of suspicion. In addition to reporting to the Assistant Judge Advocate General, the Army implementation points out that reports under the Serious Incident Report System[11] can be required as is referral to the Federal Bureau of Investigation under provisions of Army regulation depending upon the factual situation.[12]

Once reporting of the suspected misconduct has been made to the Assistant Judge Advocate General for Civil Law, that officer, acting through the Chief, Debarment, Suspension and General Branch, Litigation Division, Office of the Judge Advocate General, will coordinate future legal actions, such as the initiation of criminal prosecution, with the Department of Justice and appropriate U.S. Attorneys.[13] Of course, initial reporting of the suspected violation does not remove the contracting activity's obligation to cooperate fully with subsequent investigations conducted by law enforcement agencies or to maintain contact concerning the case with the Chief, Debarment, Suspension and General Branch.

Refusal to Pay Contract Claims or Price

Once suspected fraudulent activity has been identified and reported for possible action as discussed above, the contracting officer has the further duty to protect the position of the government and take necessary measures to avoid further payments to the contractor until the question of fraud can be resolved. As stated by the Comptroller General this is a key obligation:

> Furthermore, under the rule which has been judicially recognized for so long and so often declared in decisions of our Office that it has become a landmark in the disposition of claims involving irregularities and possibly fraudulent practices against the United States, *it is the plain duty* of administrative, accounting and auditing officers of the Government *to refuse approval and to prevent payment* of public moneys under any agreement on behalf of the United States as to which *there is a reasonable suspicion of irregularity, collusion, or fraud,* thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken. *Longwill v. United States,* 17 Ct. Cl. 288, 291; *Charles v. United States,* 19 *id.* 316, 319; *Hume v. United States,* 21 *id.* 328, affirmed, 132 U.S. 406; *United States v. Adams,* 7 Wall. 463; *Beard v. United States,* 3 Ct. Cl. 122; *McKinney v. United States,* 4 Ct. Cl. 537; *N.P.R.R. Co. v. United States,* 15 Ct. Cl. 428; also, *United States v. St. Louis Clay Products Co.* (D.C. Mo. 1946), 68 F. Supp. 902, and the other cases cited above. *Cf.* 14 Comp. Gen. 150; 15 *id.* 466; 17 *id.* 61; *id.* 240; 20 *id.* 507; 23 *id.* 907; 33 *id.* 394; 41 *id.* 206; *id.* 285.[14]

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[9] DAR § 1-600(b)(i); Army Defense Acquisition Reg. Supplement § 1-601.1 (Ch. 1, 1 Aug 1981) [hereinafter cited as ADARS].

[10] ADARS § 1-650(b).

[11] Army Reg. No. 190-40, Military Police: Serious Incident Report (1 Sept 1981).

[12] ADARS § 1-650(a). If the suspected offense carries a possible one year imprisonment and involves fraud against the United States and possible prosecution in the civil courts, as is the base in most contract situations, then reporting to the FBI is required under Army Reg. No. 27-10, Legal Services: Military Justice, Ch. 7 (3 Feb. 1969).

[13] ADARS § 1-651.

[14] 44 Comp. Gen. 110, 116 (emphasis added). *See also* Fidelity Constr. Co., Inc., DOT CAB Nos. 1113, 1123, 80-2 BCA ¶ 14,819.

In addition, this duty is mirrored by provisions of DAR which require that negotiations for settlement of terminated contracts shall be discontinued whenever there is reason to suspect fraud or other criminal conduct.[15] It is also reflected in Army Defense Acquisition Regulation Supplement (ADARS) § 1-608.50 which requires the withholding of funds pending contrary advice from the Head of Contracting Activity or the Assistant Judge Advocate General for Civil Law. Notwithstanding these restrictions on payments of "tainted" contracts, the regulations do recognize that under certain circumstances partial or continued payments under the "tainted" contract might be appropriate. An example would be to protect a right of the government or an innocent subcontractor or materialman from harm. In these situations, the contracting officer may recommend, together with supporting reasons, through the Head of Contracting Activity to the Assistant Judge Advocate General for Civil Law that a payment be made.[16]

Suspension of Contract Appeal Proceedings

Since many instances of fraud involve the submission of false or fraudulent claims, as in this article's opening example, it is possible that these fraudulent claims could be pending before a contract appeals board at the time the evidence of fraud is first discovered. Likewise, a contractor could attempt to appeal the summary denial of his claims because of fraud to contract appeals boards. As stated by the Comptroller General in the previous section, the proper forum for the adjudication of questions of fraud are the federal courts, and the contract appeal boards have long recognized their lack of jurisdiction over matters or questions of fraud and have therefore permitted suspension or dismissal, without prejudice, of board proceedings. This is doen when there is a likelihood that the resolution of the matters before the appeals board either relate to actual fraudulent conduct or are within the scope of an investigation into possible fraud.[17] A leading statement of this principle is found in the *Hillside Metal Products* case:

> We believe that it would be appropriate at this time to suspend proceedings in these appeals and to dismiss them without prejudice. The total amount of the claim is large. The Department of Justice investigation appears to be related to the asserted claims. It is not only necessary, but imperative, for the Board to know whether the claims are of a fraudulent nature before any further actions are taken in the appeals. Further proceedings here at this time, might, in the event fraud is subsequently proven in another forum, be a useless, time consuming and expensive act.[18]

A key point to be remembered is that the matters before the appeals board and the fraudulent conduct being investigated or prosecuted must be related and that the government has the burden of establishing this relationship as the party requesting the stay.[19] Because the government often will initially lack precise information concerning the nature and extent of the fraudulent conduct, the boards generally have been liberal in granting at least an initial suspension to permit the investigation to proceed and to allow the government to gather the information needed as to the extent that the fraudulent conduct will affect the board proceeding. However, the boards will not permit an open-ended or abusive suspension of proceedings and therefore the government will be expected to provide more detailed information and a greater showing of prejudice as time pas-

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[15] DAR § 8-207.

[16] ADARS § 1-605.50.

[17] Harry Lev, ASBCA No. 2869, 61-2 BCA ¶3118; Hillside Metal Prod., Inc., GSBCA Nos. 4489, 4496, 76-2 BCA ¶ 12,192; The Bryant Co., Inc., HUDBCA Nos. 75-29, 75-30, 77-1 BCA ¶ 12,467; Transport Tire Co., Harry Smookler, GSBCA Nos. 5750-S-R, 5755-S-R, 80-2 BCA ¶ 14,769.

[18] Hillside Metal Prod., Inc., GSBCA Nos. 4459, 4496, 76-2 BCA ¶ 12,192, at p. 58,690.

[19] Regional Scaffolding & Hoisting Co. Inc., GSBCA Nos. 5487, 5629, 80-2 BCA ¶ 14,491, at p. 71,445.

ses without any resolution of the questions of fraudulent conduct.[20]

In deciding whether continued suspension of the case is proper, the board apply a balancing test similar to that used by the NASA Board of Contract Appeals in the *Mayfair* case:

> In weighing competing interests, we look first to *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Circuit 1962), *cert. denied*, 371 U.S. 955.
>
> "The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority; which case should be tried first. Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities."
>
> Against this basic policy determination, the following factors are pertinent in deciding whether to exercise our discretion in favor of further staying the proceedings before us: (1) considerations of comity; (2) promotion of judicial efficiency; (3) adequacy and extent of relief available in the alternative forum; (4) identity of parties and issues in both actions; (5) likelihood of prompt disposition in the alternative forum; (6) convenience of parties, counsel and witnesses; and (7) possibility of prejudice to a party as a result of the stay. *Nigro v. Blumberg*, 373 F. Supp. 1206 (1974).[21]

In *Mayfair*, the NASA board of Contract Appeals looked at all the stated factors and decided that the fraud issues before a federal grand jury investigation were apparently not related factually to the pending claims; that there was severe prejudice to the contractor and its subcontractors in not receiving the prompt adjudication of their claims as was their right under the "disputes" clause; that it was only speculative, at best, as to when the possible criminal investigation would end as no indictments had been handed down yet in the case; and that possible harm to the grand jury proceedings from board discovery proceedings could be guarded against by protective discovery measures within the powers of the board. Based upon these findings, the board therefore refused to grant any additional suspension to the government.[22]

When requesting a suspension or dismissal of board proceedings because of fraud, the contracting officer and his attorney should consider the balancing test that will be applied. They should clearly establish the possible relationship between the alleged fraud and the matter before the board and they should clearly demonstrate the nature of the criminal/civil proceedings expected to the pursued by the government. They should obtain and present a meaningful estimate of when and how those proceedings will be concluded and must clearly indicate any possible prejudice, such as compromise of the grand jury proceedings, which could follow from the continuation of the appeals before the board. One aid in satisfying this burden is to request that the Department of Justice or appropriate U.S. Attorney state in writing their desires as to suspension and the harm that they perceive to the public interests should suspension not be granted. This presentation could also be buttressed by the actual appearance of the Department of Justice attorney before the board.[23] It must be remembered, however, that the mere statement of prejudice or request for suspension, even from a U.S. Attorney, will not alone justify an indef-

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[20] *See, e.g., id.*

[21] Mayfair Constr. Co., NASA BCA No. 478-6, *et. al.*, 80-1 BCA ¶ 14,261, at p. 70,251. *See also*, Ingalls Shipbldg. Div., Litton Sys., Inc., ASBCA No. 22645, 78-2 BCA ¶ 13,350.

[22] Mayfair Constr. NASA BCA No. 478-6, *et. al.*, 80-1 BCA ¶ 14,261, at pp. 70,252-70,253.

[23] Such appearance is authorized by 28 U.S.C. § 517.

inite suspension of proceedings without supporting documentation or specific statements.[24]

Debarment and Suspension

As noted earlier, suspected fraudulent activity must be reported within the Department of Army to the Assistant Judge Advocate General for Civil Law in accordance with the debarment/suspension procedures.[25] Thus, the possibility of debarment or suspension exists in all cases of fraud and the contracting officer should formulate his recommendations and actions with this possibility in mind.

As discussed earlier, DAR § 1-608 sets forth the requirements of the contents of all reports and recommendations. Likewise, DAR § 1-604.1 sets forth the grounds for debarment, which include conviction of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or the performance of a public contract or any subcontract thereunder.[26] However, conviction is not actually necessary as debarment can also be based upon "other cause of such serious and compelling nature ... as may be determined ... to justify debarment."[27] Thus, debarment can be pursued in cases of fraud even when the Department of Justice may, for whatever reason, decline prosecution.

Also important is the suspension procedure which protects the government while the alleged fraud is investigated or prosecuted. Such suspension action is authorized "upon adequate evidence"[28], a standard obviously less than that necessary for a conviction. The suspension procedures also provide for extensive coordination of the suspension action with the Department of Justice in order to determine whether a hearing will be granted to the contractor prior to suspension. This provision is designed to protect any possible criminal or civil action by the Department of Justice from prejudice. If prosecution of the alleged fraud is actually begun by Department of Justice, then suspension of the contractor will last until the legal proceedings are completed.[29] As noted earlier, the Army procedures provided for limited continued administration of contracts as authorized by the Assistant Judge Advocate General for Civil Law despite a suspension or debarment.[30]

Cancellation of the Contract

Another action which the contracting officer who is faced with a contract "tainted" by fraud should consider recommending is cancellation of the contract itself. This is a drastic, yet long recognized, common-law remedy which may be invoked by the United States. It recognizes the judicial principle that no right arising from a contract made in violation of a penal statute will be enforced by the courts on behalf of the wrongdoer.[31] Thus, it has been recognized that the government can cancel or annul contracts because of violation of conflict of interest prohibitions,[32] illegal kickbacks,[33] and false claims.[34] Additionally, this right is available even if the applicable statute establishes other criminal or civil remedies on behalf of the government and fails to specifically provide for cancellation as a remedy. All that is necessary is that cancella-

[24] *See Regional Scaffolding & Hoisting Co. Inc.*, GSBCA Nos. 5487, 5629.80-2 BCA. ¶ 14,491 at p. 71,445, in which the "... mere statement that the criminal investigation bears a direct relation to the civil action ..." without any effort to particularize either the nature of the relationship or the possible prejudice to the Government was rejected by the GSA Board of Contract Appeals.

[25] ADARS § 1-608.3.

[26] DAR § 1-604.1(i) (15 May 1981).

[27] DAR § 1-604(iii) (15 May 1981).

[28] DAR § 1-605.1.

[29] DAR § 1-605.2.

[30] ADARS §§ 1-604.50 and 1-605.50.

[31] Michigan Steel Box Co. v. United States, 49 Ct. Cl. 421 (1914).

[32] United States v. Mississippi Valley Generating Co., 364 U.S. 520, *reh'g denied*, 365 U.S. 855 (1961); Crocker v. United States, 240 U.S. 74 (1915).

[33] United States v. Acme Process Equip. Co., 385 U.S. 138, *reh'g denied*, 385 U.S. 1032 (1966).

[34] Brown v. United States, 207 Ct. Cl. 768 (1975).

tion be consistent with and essential to effectuating the public policy interest of proscribing fraudulent conduct.[35] Since in most cases to continue to enforce the contract against the government would benefit the fraudulent contractor in some way, the courts have had no difficulty in finding cancellation a necessary remedy.

The government need not obtain a conviction for fraudulent conduct before invoking the right of cancellation. Indeed, the right has been successfully invoked despite the previous acquittal of a contractor.[36] In cancelling a tainted contract, the government need not prove the fraud "beyond a reasonable doubt" but only must establish the fraud by a preponderance of the evidence.[37]

The major problem present in exercise of the cancellation remedy is determining who within the government can exercise the right. This problem is amply demonstrated by the *Medico* case. In *Medico*, the contracting officer cancelled a contract for 60mm projectiles because of apparent violations of conflict of interest prohibitions by a former contracting officer. Thereafter, the government sought dismissal of contract claims on the same contract which were currently pending before the Armed Services Board of Contract Appeals (ASBCA) on the basis that cancellation of the contract terminated the ASBCA's jurisdiction over all contract questions including the contract claims. The ASBCA denied the motion to dismiss and noted that the power to take action in regard to questions of fraud had apparently been delegated not only to the contracting officer, but also to the Assistant Judge Advocate General for Civil Law and the Chief, Debarment, Suspension and General Branch, Litigation Division, OTJAG. Therefore, the ASBCA concluded that the contracting officer lacked the authority to cancel the contract for violation of the conflict of interest statutes because such authority had apparently been withheld.[38]

Assuming that the ASBCA is correct on the lack of contracting officer authority to cancel a "tainted" contract, who then can exercise this right? Under the case law, at least the Secretary of the Army can exercise this power.[39] Additionally, the *Medico* case, in quoting the ADARS provisions on fraud,[40] suggests that the Assistant Judge Advocate General for Civil Law and the Chief of the Debarment and Suspension and General Branch, Litigation Division, OTJAG, have the delegated authority to cancel a "tainted" contract. Thus, it is clear that the authority to cancel a contract does exist and can be exercised at Department of Army level. Therefore the contracting officer should be alert to the possibilities of cancellation and recommend this action when suspected fraudulent conduct is reported.[41]

Recoupment

Another action that the government may consider taking in those cases where a govern-

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[35] *See* notes 32-34, *supra*.

[36] United States v. Acme Process Equip. Co., 385 U.S. 138, *reh. den.*, 385 U.S. 1032 (1966). In *Acme* the contractor had been acquitted of a violation of the Anti-Kickback Act (41 U.S.C. §§ 51 *et seq.* (1976)) because the Act at that time did not apply to contracts such as the contractor's. The Act was subsequently amended to apply to such contracts and the Supreme Court refused to allow the contractor to enforce the contract against the Government as a matter of policy.

[37] Michigan Steel Box Co. v. United States, 49 Ct. Cl. 421, 438 (1914).

[38] Medico Indus., Inc., ASBCA No. 22141, 80-2 BCA ¶ 14,498; *recon. denied*, 80-2 BCA ¶ 14,665. The ASBCA has long held that contemporaneous investigations of fraud do not automatically divest it of jurisdiction even though it lacks jurisdiction over the actual question of fraud. See note 21, *supra*.

[39] See Crocker v. United States, 240 U.S. 74 (1915); Michigan Steel Box Co. v. United States, 49 Ct. Cl. 421 (1914).

[40] ADARS §§ 1-650-1-652; Medico Indus. Inc., ASBCA No. 22141, 80-2 BCA ¶ 14,498, at pp. 71,469-71,470.

[41] 18 U.S.C. § 218 (1976) provides that the President may cancel contracts after a conviction for fraudulent activity. However, for reasons discussed in the following section of this article concerning recoupment of contract payments, this section is of little current use.

ment contract has been tainted by fraud is recoupment of funds already paid to the contractor. This recovery of funds is in addition to those fines, penalties, and damages provided by statutes such as the False Claims Act[42] on contract clauses.

18 U.S.C. § 218 is the statutory basis for the government's right of recoupment and provides:

> In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract, loan, grant, subsidy, license, right, permit, franchise, use, authority, privilege, benefit, certificate, ruling, decision, opinion, or rate schedule awarded, granted, paid, furnished, or published, or the performance of any service or transfer or delivery of anything to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in relation to which there has been a final conviction for any violation of this chapter, *and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof.* (Emphasis supplied).

While section 218 provides a statutory basis for seeking recovery of all contract funds paid to a contractor under a "tainted" contract, there are two limitations which reduce its effectiveness as a remedy. The first limitation is that the remedy is available only after "there has been a final conviction for any violation of this chapter. . . ." Thus a section 218 action can be brought only after a criminal conviction has been attained. Setting aside the obvious delay and proof difficulties usually encountered in the criminal forum, the section 218 remedy is inadequate because by its terms it is not available where the Department of Justice has elected to pursue the civil false claims remedy. Likewise, it is unavailable where administrative determinations of fraud, as in the debarment/suspension procedure, have been properly made.

The second and more significant limitation upon section 218 is that only the President can invoke section 218 in the absence of regulations delegating authority to act to department heads. Although enacted in 1962, no executive order or other regulation implementing section 218 has ever been issued by the President and there are no reported instances of the President invoking his section 218 power.[43] Thus, although presidential action in individual cases is theoretically possible, the lack of established procedures has rendered section 218 largely meaningless at present. Nevertheless, section 218 is important because it potentially could quickly be activated by issuing regulations without further congressional action to fill the void if the existing fraud remedies of the government become inadequate or are perceived as being ineffective. It also represents a strong statement of public policy favoring both cancellation and recoupment as remedies for fraud.

While section 218 establishes a limited—if at present unused—statutory recoupment right, Congress provided that it is "[i]n addition to any other remedies provided by law. . . ." and the courts have held that section 218 does not limit the inherent common law right of the United States to recover the moneys paid in violation of law or policy.[44]

A leading case setting forth the extent of the government's common law recoupment right is *K&R Engineering Co. Inc. v. United States.*[45] In *K&R* the contractor brought suit in the Court of Claims to recover the unpaid balance on a barge repair contract which the govern-

[42] 18 U.S.C. § 287.

[43] Sullivan, *Procurement Fraud—An Unused Weapon,* 95 Mil. L. Rev. ___ (1982).

[44] United States v. Podell, 572 F.2d 31, 35 (2nd Cir. 1978).

[45] K&R Eng'g. Co., Inc. v. United States, 616 F.2d 469 (Ct. Cl. 1980).

ment had terminated for default because of performance deficiencies. The government defended the suit on the basis that the contractor's participation in a scheme to violate the conflict of interest statutes prohibited the enforcement of the contract against the government. The government also counterclaimed for the refund of all moneys previously paid to the contractor under this and two other contracts prior to discovery of the fraudulent conduct.[46] In holding for the government on both the defense and counterclaim, the Court of Claims did not restrict the recoupment remedy to conviction situations as in section 218 but instead stated that "nothing ... even suggests that a criminal conviction is necessary ..." as a prerequisite for either avoidance of a "tainted" contract or recovery of moneys previously paid to the contractor on a "tainted" contract.[47]

The court also declined to limit the government's remedy in response to the arguments of the contractor that the government must prove actual pecuniary loss or harm as a result of the fraudulent conduct before it could recoup moneys already paid. Instead the court stated:

> Moreover, the argument is inconsistent with the basic principles applied in *Mississippi Valley* that once corruption is proven, all financial considerations, such as damage to one party or benefit to the other, are irrelevant to the government's right to disavow the contract. The same principle also requires refund of amounts paid under the tainted contracts, and the question whether the government suffered pecuniary loss from the contracts similarly is irrelevant.[48]

The Courts of Claims also clearly stated the considerations of public policy which support the government right of recoupment:

> The protection of the integrity of the federal procurement process from the fraudulent activities of unscrupulous government contractors and dishonest government agents requires a refund to the government of sums already paid the plaintiff no less than it requires nonenforcement of the contract not yet completed. The policy considerations enunciated in *Mississippi Valley* and discussed above are just as applicable to the former situation as to the latter.
>
> Effective implementation of the conflict-of-interest law requires that once a contractor is shown to have been a participant in a corrupt arrangement, he cannot receive or retain any of the amounts payable thereunder. Permitting the contractor to retain amounts already received would create the danger that "[m]en inclined to such practices, which have been condemned generally by the courts, would risk violation of the statute knowing that, if detected, they would lose none of their original investment, while, if not discovered, they would reap a profit for their perfidy." *Town of Boca Raton v. Raulerson*, 108 Fla. 376, 379, 146 So. 576, 577 (1933).
>
> To deny the government recovery of amounts paid under such tainted contracts would reward those contractors who can conceal their corruption until they have been paid.[49]

Thus *K&R* stands as a clear statement of the right of the government to recover moneys previously paid under a fraudulent or "tainted" contract even in the absence of a criminal conviction or actual financial loss to the government. Further, this right exists even though

[46] *Id.* at 470.

[47] *Id.* at 474. In *K&R*, convictions under 18 U.S.C. § 201(f) (bribery of a public official), 18 U.S.C. § 371 (conspiracy) and 18 U.S.C. § 208 (conflict of interest) had been previously obtained in relation to two of the three contracts on which the Government counterclaimed. No conviction related to the barge repair on which *K&R* sued for breach of contract had ever been obtained. The Government was able to present uncontested proof that similar illegal activity had also "tainted" the barge repair contract, see 616 F.2d at 471-472.

[48] *Id.* at 477.

[49] *Id.* at 476.

the government has received and used the services and goods provided by the tainted contract because the contractor is likewise prohibited from recovery under *quantum meruit* or *quantum valebant* theories.[50] One caveat to this remedy is that often an entire contract is not "tainted" by fraudulent conduct. In *K&R*, the entire award of the contracts, their administration, and claims under them were all infected by the illegal actions.[51] Thus the court could clearly find that the *K&R* contracts as a whole were tainted and that all moneys paid under them should be returned. However, often fraudulent conduct may involve only a small part of a large contract or project as, for example, padding a claim for changed work. In that situation the recoupment remedy would probably be limited to recovery of the amount paid for the change and not to all sums otherwise properly paid under the contract.

Because recoupment as provided for under *K&R* is an effective means of increasing the risks to contractors from fraudulent conduct, it is an effective tool in combating fraud in government contracts. Contracting officers and government attorneys should recommend its employment to the Department of Justice whenever it appears that fraud has resulted in payments of a claim, modification, or in appropriate cases, an entire contract so that the Department of Justice can assert the claim as a counterclaim in the Court of Claims or bring a civil recovery action in the appropriate U.S. District Court.[52]

Conclusion

As the above discussion shows, the contracting officer has a key role in fashioning the response of the government to possible contractor fraud. The contracting officer has the duty to report the allegation as soon as suspicion arises. He also has the duty to protect the public from additional harm by withholding further payments until the fraud allegations are resolved and by seeking suspension of claims litigation where appropriate. Finally, the contracting officer has the right to take the lead in recommending suspension/debarment of the contractor, cancellation of the tainted contract, and recoupment of public funds already paid to the contractor. While these actions will not end for all time the problem of contract fraud, the vigorous application of the above procedures will assure the public that its business is being conducted with a true concern for discovering and punishing fraudulent conduct.

[50] *Id.* at 475-476.

[51] *Id.* at 477.

[52] Because contracting officer's lack authority over questions of fraud under the disputes clause, the boards of contract appeals likewise do not have jurisdiction over Government recoupment claims. See DAR §§ 1-314(c) and (g) and Medico Indus., Inc., ASBCA No. 22141, 80-2 BCA. ¶ 14,498, *recon. denied*, 80-2 B.C.A. ¶ 14,665.

Servicemen's Group Life Insurance: An Extra Layer of Protection for Reserve Component Personnel

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I. Introduction

With relatively few exceptions, members of the United States Army Reserve and the Army National Guard are employed in the civilian sector in addition to their part-time military employment. In many instances, their civilian employers provide insurance and retirement benefits which, together with Social Security, furnish basic financial protection for their families both before and after the reservist or guardsman retires from civilian employment. Career reservists and guardsmen have additional protection through Servicemen's Group

Life Insurance (SGLI)[1] and the Survivor Benefit Plan (SBP).[2] SGLI coverage for reservists and guardsmen is usually automatic as an incident to their part-time military service unless they elect otherwise.[3] In the case of a member who is married or has a dependent child, SBP is elective at retirement and, if not elected at that time, automatic when retired pay commences at age 60 unless the member elects otherwise.[4]

Low cost SGLI is provided in $5,000 increments up to a maximum, full-time coverage of $35,000 generally from the time reservists and guardsmen enter military service until they become eligible to draw retired pay at age 60.[5] Overlapping SGLI for a number of years, SBP protection in the form of a survivor annuity of up to something less than 55 percent of a member's retired pay payable to the member's spouse or dependent children may be elected upon receipt of the statutory notice of eligibility for retired pay (*i.e.*, the "20-year letter"),[6] and an immediate annuity option is available so that payments with an appropriate actuarial reduction, may begin as early as the member's death prior to reaching age 60.[7]

[1] *See* 38 U.S.C. §§ 765–779 (1976), *as amended by* Pub. L. No. 97–66, §§ 401–402, 95 Stat. 102 (1981); 38 C.F.R. §§ 9.1–9.36 (1981); VA Handbook 29–75–1, Servicemen's and Veterans' Group Life Insurance Handbook (Jun. 1979); [hereinafter cited as VA Handbook]; AR 608–2, Personal Affairs—Servicemen's Group Life Insurance (SGLI)—Veterans' Group Life Insurance (VGLI) (20 Dec. 1976) [hereinafter cited as AR 608–2]. Neither the Code of Federal Regulations, the Veterans Administration Handbook, nor AR 608–2 have been changed to reflect the legislative amendment to SGLI in 1981. Nevertheless, since the amendment merely increased from $20,000 to $35,000 the maximum amount of SGLI coverage effective 1 December 1981, readers may generally rely on these authorities for aspects relating to the general administration of SGLI, but should disregard any outdated any references therein to $20,000 as being the maximum amount of coverage.

[2] *See* 10 U.S.C. §§ 1447–1455 (1976 & Supp. IV 1980); AR 608–9, Personal Affairs—Survivor Benefit Plan (SBP) (C2, 8 Dec. 1975). AR 608–9 has not been changed to reflect legislative amendments to SBP in 1976 and further amendments of particular importance to reservists and guardsmen in 1978 and 1980.

[3] *See* 38 U.S.C. §§ 765(5)(B), 767(a)(2) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981).

[4] *See* 10 U.S.C. § 1448(a)(1), (2) (Supp. IV 1980).

[5] 38 U.S.C. §§ 765(5)(B), (C), 767(a)(2), (3)(1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981).

[6] 10 U.S.C. §§ 1447(2)(B), 1448(a)(1)(B), (2)(B), 1451(a)(1), (d) (Supp. IV 1980). If an SBP election is made at retirement, it must be made within 90 days following receipt of the 20-year letter. The 20-year letter is a notification by the Secretary of the Army under 10 U.S.C. § 1331(d) (Supp. IV 1980) that the reserve component member to whom it is addressed has completed 20 years of qualifying service for retirement purposes as computed under 10 U.S.C. § 1332 (1976 & Supp. IV 1980). Although administrative delays are not infrequent, 20-year letters are supposed to be issued within one year after members complete 20 years of qualifying service and, in addition, must include notification of the available SBP elections, *see* note 7, *infra*. Practically speaking, a year of qualifying service for retirement purposes is each one-year period in which the member has been credited with 50 retirement points. *See* 10 U.S.C. § 1332(a)(2) (1976); AR 135–180, Army National Guard and Army Reserve—Qualifying Service for Retired Pay Nonregular Service, paras. 2–8 (C2, 1 Jun. 1978), 2–10*b* (C3, 15 Dec. 1978).

[7] 10 U.S.C. §§ 1448(a)(1)(B), (2)(B), (e), 1451(d) (Supp. IV 1980). The election at retirement is an election *into* SBP, and a member electing in must further elect whether, in the event of death before age 60, the SBP annuity will commerce at such time or on what would have been the member's 60th birthday. *Id.* It should be noted that SBP annuities are integrated with Social Security on a dollar-for-dollar offset basis, but the offset is limited to not more than 40% of the annuity without reduction for Social Security. Thus, the SBP annuity of a widow having a dependent child is reduced by the mother's benefit under Social Security to which the widow would be entitled based solely upon the member's military service. *Id.* § 1451(a)(1)(B), (2) (Supp. IV 1980). Further, assuming there are no dependent children, when an SBP annuitant, widow or widower, is over age 62, the annuity is reduced by the amount of Social Security which the annuitant would be entitled to based solely upon the member's military service and assuming that the member had lived to age 65. *Id.* § 1451(a)(1), (3). In implementing the Social Security offset, consideration was given to a formula under which the Social Security attributable to a member's nonmilitary wages would have reduced the amount of the offset. The Comptroller General of the United States opined that the Social Security offset must "be calculated solely on the basis of a member's wages at-

SGLI is term insurance provided under a group policy issued by a commercial insurer licensed to transact the business of life insurance in all fifty states and having in force at least one percent of all group life insurance in force in the United States.[8] Portions of the coverage are reinsured with other qualifying life insurance companies.[9] The group policy providing SGLI is issued to the Administrator of Veterans' Affairs, and SGLI is administered by the Office of Servicemen's Group Life Insurance (OSGLI).[10] Being term insurance, SGLI has no cash or loan values and does not provide any paid-up or extended term insurance which survives the termination of coverage.[11] The cost of SGLI is generally borne by the personnel insured; however, the government pays for the cost of mortality attributable to the extra hazards of military duty, normally only in time of war.[12]

Most reservists and guardsmen are aware of SGLI and accept full-time, maximum coverage during periods of eligibility prior to retirement. For too many are unaware of their options at retirement, including the right to have SGLI continued for the years between retirement from military service and the commencement of retired pay at age 60. This article is, therefore, intended to equip Reserve and National Guard judge advocates with basic facts about SGLI as applicable to the Reserve Components of the Army.

II. Full-time Coverage for Extended Periods of Active Duty

As with members of the active components of the Army, full-time SGLI coverage is provided to reservists and guardsmen who perform full-time active duty or active duty for training pursuant to orders that do not specify a period of less than thirty-one days.[13] Full-time cov-

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tributable to military service, without consideration of any Social Security covered wages attributable to nonmilitary service." Pay—Retired—Annuity Elections for Dependents—Survivor Benefit Plan—Social Security Offset, 53 Comp. Gen. 733, 736 (1974). *See also* Marjorie S. Nester, 58 Comp. Gen. 795 (1979); Mary E. Bitterman, 57 Comp. Gen. 339 (1978). Military pay for inactive duty training is not "wages" for Social Security purposes and therefore cannot contribute to the Social Security offset. *See* I.R.C. § 3121(m) (1956). The wages derived by some reservists and guardsmen from their civilian employment, either alone or when supplemented by military wages, exceed the Social Security wage base with the result that under I.R.C. § 6413(c)(1) (1976), they are entitled to an income tax refund (or credit) for the amount by which total Social Security taxes withheld from all wages exceed the applicable tax on the Social Security wage base. To the extent the part-time military service of reservists and guardsmen for periods of active duty of 30 days or less performed on and after December 1, 1980 gives rise to such tax refunds, military wages should not contribute to the Social Security offset. *See* 10 U.S.C. § 1451 (a)(4) (Supp. IV 1980).

[8] 38 U.S.C. § 766(a) (1976); 38 C.F.R. § 9.1(h), (i) (1981); VA Handbook, para. 1.04*a*, *c*. Currently, the primary insurer for SGLI is The Prudential Insurance Company of America.

[9] 38 U.S.C. § 766(c) (1976); 38 C.F.R. §§ 9.1(k), 9.28 (1981).

[10] 38 U.S.C. § 766(b) (1976); 38 C.F.R. § 9.1(j) (1981); VA Handbook, para. 1.04*b*; AR 608-2, para. 2-1. OSGLI is located at 212 Washington Street, Newark, New Jersey 07102.

[11] VA Handbook, para. 1.04*c*; AR 608-2, para. 2-2*a*.

[12] 38 U.S.C. §§ 769, 771 (1976), *as amended by* Pub. L. No. 97-66, § 402, 95 Stat. 1026 (1981); 38 C.F.R. §§ 9.10, 9.12, 9.14 (1981); VA Handbook, para. 1.08*a*. *See also* S. Rep. No. 723, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 3117, 3126.

[13] 38 U.S.C. §§ 765(1)(A), (2)(A), (D), (5)(A), 767(a)(1), 768(a)(1) (1976), *as amended by* Pub L. No. 97-66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. §§ 9.1(a)(1), (b)(1), (d)(1), (4), 9.5(a) (1981); VA Handbook, paras. 1.02*a*(1), *b*(1), *d*(1), (4), 1.03*a*(1), 1.06*a*(1); AR 608-2, para. 2-3. The statutory definition of "active duty for training" for purposes of SGLI (§ 765(2)(D)) includes full-time training duty performed by members of the National Guard. The term "full-time training duty" is defined in AR 310-25, Military Publications—Dictionary of United States Army Terms, 122 (C2, 1 Jun. 1979), as follows:

> Full-time training or duty, with or without pay, authorized for members of the Army National Guard under 32 U.S.C. 316 and 502-505. This duty is performed in State status and includes annual training, attendance at Army service schools, Army area schools, Air defense region schools, participation in small arms competition, attendance at military conferences, short tours for special projects, ferrying aircraft and participation in command post exercise maneuvers. See also *annual training*.

erage means that coverage applies regardless of when death occurs, even if a member's death is in no way connected with the performance of military duty.[14] The maximum coverage of $35,000 on extended periods of active duty is automatic unless declined or cancelled in increments of $5,000.[15] A discharge and immediate reenlistment or a discharge for the purpose of accepting a commissioned or warrant officer appointment terminates a prior waiver or reduction of coverage and results in automatic, maximum coverage following the change in the member's status regardless of whether the change involves a break in service.[16]

Coverage for reservists and guardsmen during extended periods of active duty becomes effective on the first day of such duty and normally terminates 120 days after separation or release from that duty.[17] SGLI coverage remains in effect through the 120-day period without further cost to the member.[18] If, during the 120-day period, the reservist or guardsman should become entitled to full-time coverage as a unit member, the $35,000 maximum applies to the member's total coverage notwithstanding the overlapping periods of coverage.[19]

III. Full-time Coverage for Unit Personnel

Full-time SGLI coverage is provided to reservists and guardsmen who are unit members and to reservists in the Individual Ready Reserve (IRR) who are attached for training in a nonpay status to units scheduled to perform at least twelve periods of inactive duty training annually.[20] Like other full-time coverage, the coverage of unit members applies even if death is not connected with military duty and also if death results from a cause unconnected with military duty and on a day when no military

[14] AR 608-2, para. 2-14*a*.

[15] 38 U.S.C. § 767(a)(1) (1976), *as amended by* Pub L. No. 97-66, § 501, 95 Stat. 1026 (1981); 38 C.F.R. §§ 9.4, 9.5(a), 9.6(a) (1981); VA Handbook, paras. 1.03*a*(1), 1.04*d*, 3.01*a*; AR 608-2, paras. 2-3, 2-5*b*.

[16] 38 C.F.R. § 9.8(a) (1981); VA Handbook, paras. 3.01*a*, 4.01*a*; AR 608-2, para. 2-5*d*.

[17] 38 U.S.C. §§ 767(a), 768(a)(1)(A) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. §9.5(a) (1981); VA Handbook, paras. 1.05*b*(1), 1.06*a*(1), 2.01*a*(1), 3.01*b*; AR 608-2, paras. 2-6*a*, 2-15*a*(1), *b*(1)*(a)*. If a member on active duty goes AWOL or is confined by civil authorities under a sentence adjudged by a civil court or by military authorities under a court-martial sentence involving a *total* forfeiture of pay and allowances, SGLI coverage terminates at the end of the 31st day of continuous AWOL or confinement. Insurance and beneficiary designations in effect prior to such an AWOL or confinement are automatically revived when the member is restored to duty with pay. *See* 38 U.S.C. § 768(a)(1)(B) (1976); 38 C.F.R. §§ 9.8(b) 9.24(a) (1981); VA Handbook, paras. 2.01*a*(2), 4.01*b*; AR 608-2, paras. 2-6*b*, *c*, *e*, 2-7. Apparently, confinement for a continuous period of more than 31 days under a special court-martial sentence not involving a total forfeiture of pay and allowances does not result in a termination of SGLI coverage. *See* 38 C.F.R. § 9.5(c) (1981); VA Handbook, para. 2.01*a*(2)*(b)*; AR 608-2, para. 2-6*d*. SGLI coverage is forfeited by any person found guilty of mutiny, treason, spying or desertion or who by reason of conscientious objection refuses to perform military service or to wear the military uniform and, although SGLI would cover death by execution when inflicted by an enemy of the United States, it does not cover death inflicted as a lawful punishment for a crime or for a military or naval offense. *See* 38 U.S.C. § 773 (1976); 38 C.F.R. § 9.34 (1981); VA Handbook, para. 1.11 (June 1979); AR 608-2, para. 2-8.

[18] VA Handbook, para. 1.08*h*; AR 608-2, para. 2-6*a*. *See also* 38 U.S.C. § 769(a)(1) (1976); 38 C.F.R. § 9.10(a) (1981).

[19] AR 608-2, para. 2-2*b*. For the conversion of SGLI to Veterans' Group Life Insurance (VGLI) within the 120-day period, *see* note 44 and accompanying text, *infra*. No inference should be drawn that full-time SGLI coverage as a unit member during the 120-day period following separation or release from an extended period of active duty is without cost to the member due to overlapping periods of coverage and the maximum limitation on total SGLI coverage. For rules on the collection of premiums monthly as full-time SGLI coverage is provided, whether during an extended period of active duty or as a unit member, *see* notes 97-100 and accompanying text, *infra*.

[20] 38 U.S.C. §§ 765(3), (5)(B), 767(a)(2), 768(a)(4) (1976), *as amended by* Pub. L. No. 97-66, §401, 95 Stat. 1026 (1981); 38 C.F.R. §§ 9.1(a)(2), (e), 9.5(a) (1981); VA Handbook, paras. 102*a*(2), *e*, 1.03*b*(1); AR 608-2, paras. 2-3, 2-12*a*, *b*.

duty is performed or scheduled to be performed.[21] As with coverage during extended periods of active duty, maximum coverage is automatic for unit personnel and IRR personnel attached for training unless declined or canceled in increments of $5,000.[22] Coverage for unit members and IRR personnel attached for training becomes effective on the first day of assignment or attachment to a unit and normally terminates 120 days after separation or release from such assignment or attachment.[23]

IV. Full-time Coverage for Retirees

Full-time coverage is also available to reservists and guardsmen who have completed at least twenty years of qualifying service for retirement purposes and are eligible for assignment to the Retired Reserve and, in the case of unit personnel, who have been separated or released from assignment or attachment to a unit.[24] A retiree applies for coverage by submitting VA Form 29-8713 and one month's premium to OSGLI.[25] Such coverage will be issued regardless of the retiree's health if application is made within 120 days after the date the member qualifies.[26]

A unit member who has previously completed twenty years of qualifying service for retirement purposes is eligible for retiree coverage upon separation or release from unit assignment or attachment whether or not there is a concurrent transfer to the Retired Reserve.[27] A member of the IRR not eligible for full-time coverage by reason of attachment to a unit for training is eligible for retiree coverage upon completing twenty years of qualifying service for retirement purposes.[28] Although applications should be made within the appropriate 120-day period of eligibility, OSGLI will consider applications containing a completed health statement within one year of the date an IRR member completed twenty years of qualifying service for retirement purposes and, in the case of unit personnel, within

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[21] AR 608-2, para. 2-14*a*.

[22] 38 U.S.C. § 767(a)(2) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. §§ 9.4, 9.5(a), 9.6(a) (1981); VA Handbook, paras. 1.03*b*(1), 1.04*d*, 3.01*a*, *b*; AR 608-2, paras. 2-3, 2-13*a*.

[23] 38 U.S.C. §§ 767(a)(2), 768(a)(4) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. § 9.5(a) (1981); VA Handbook, paras. 1.03*b*(1), 1.06*a*(1), 2.01*b*; AR 608-2, paras. 2-15*a*(3), *b*(1)*(b)*.

[24] 38 U.S.C. §§ 765(5)(C), 767(a)(3), 768(a)(5) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. §§ 9.1(a)(3), 9.5(a) (1981); AR 608-2 paras. 2-3, 2-12*c*.

[25] *See* VA Handbook, para. 4.03*c*, app. A, figs. 11, 12; AR 608-2, para. 2-13*b*, *c*, app. A, figs. A-7, A-8. Copies of the current version of VA Form 29-8713 reflecting the increase in maximum coverage to $35,000 may be obtained from OSGLI.

[26] 38 C.F.R. § 9.3(b) (1981); VA handbook, para. 4.03*c*, *e*.

[27] 38 U.S.C. § 767(a) (1976); 38 C.F.R. § 9.3(b) (1981); VA Handbook, para. 4.03*c*; AR 608-2, para. 2-15*b*(1)*(b)*. A unit member who has completed 20 years of qualifying service for retirement purposes may remain active in the IRR for a number of years following separation or release from unit assignment or attachment, perhaps serving as a mobilization designee and thereby delaying assignment to the Retired Reserve. If such a member should thereafter again be assigned or attached to a unit and entitled to full-time SGLI coverage as a unit member before final assignment to the Retired Reserve, he or she would qualify for retiree coverage upon each separation or release from unit assignment or attachment. Indeed, because of the limited scope of part-time coverage in the IRR, *See* notes 36-39 and accompanying text, *infra*, such coverage might be declined in favor of retiree coverage. When full-time coverage as a unit member is resumed, the member would find it more economical to discontinue retiree coverage since retiree coverage is somewhat more expensive than coverage while assigned or attached to a unit. *See generally* VA Handbook, para. 1.08*d*, *e*; Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), para. 70405 (C62, 12 Nov. 1980). The Department of Defense Military Pay and Allowances Entitlements Manual has not been changed to reflect the legislative amendment to SGLI in 1981 and the premiums to be deducted from pay for the higher levels of coverage now available. It should be noted that the monthly premiums appearing in AR 608-2, Table 2-1, applicable to "All Other Eligibles" are not up to date. *See* note 91, *infra*.

[28] 38 C.F.R. § 9.3(b) (1981); VA Handbook, para. 4.03*c*, *e*.

one year of the date the member's unit coverage terminated, *i.e.*, within one year following the date 120 days after the member was separated or released from unit assignment or attachment having previously completed 20 years of qualifying service for retirement purposes.[29] In the case of unit personnel applying within the 120-day period of eligibility, full-time SGLI coverage simply continues as retiree coverage beginning on the 121st day after separation or release from unit assignment or attachment.[30] In all other cases, retiree coverage becomes effective upon application and payment of one month's premium assuming coverage is approved in cases involving applications made after the close of the 120-day period of eligibility.[31] Retiree coverage terminates at age 61 or upon receipt of the first payment of retired pay after reaching age 60, whichever first occurs.[32]

Proof of eligibility, such as copies of the member's 20-year letter and orders reflecting the member's status such as assignment to the Retired Reserve or separation or release from assignment or attachment to a unit, must be submitted to OSGLI in support of an application for retiree coverage.[33] If retiree coverage is desired but proof of eligibility is not immediately available during the 120-day period of eligibility, as is almost always the case with IRR personnel, an undocumented application accompanied by one month's premium should nevertheless be made in order to preserve the member's right to coverage without proof of good health. Coverage will then be issued upon submission of the necessary documentation.[34] As with other full-time coverages, retiree coverage may be selected in $5,000 increments to a maximum of $35,000.[35]

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[29] 38 C.F.R. § 9.3(b) (1981); VA Handbook, para. 4.03*d*, *e*. In general, applications submitted to OSGLI beyond the 1-year period "will *not* be considered." *See id* at app. A, fig. 12, para. A. If retiree coverage is not applied for within the appropriate 120-day or 1-year period, the only way for a member to obtain such coverage is firest to acquire full-time coverage as a unit member, *see* notes 20–23 and accompanying text *supra* whether by assignment or attachment, and even if for only a brief period of time. Upon separation or release from unit status, the member will enter another 120-day period of eligibility for retiree coverage. The problem of inadvertent waiver of retiree coverage is most likely to be encountered by IRR personnel who remain active as mobilization designees or otherwise beyond the completion of 20 years of qualifying service for retirement purposes. Nor can they properly claim entitlement at a later date on the basis of AR 608–2, para. 2–13*b*(1), which provides that members of the Retired Reserve who have completed 20 years of qualifying service for retirement purposes must apply for retiree coverage on VA Form 29–8713. That provision appears to have been intended to cover personnel in the Retired Reserve on May 24, 1974, who became eligible for coverage in the transition following the initial statutory authorization of retiree coverage. *See* Pub. L. No. 93–289, § 4(1), 88 Stat. 165 (1974), *amending* 38 U.S.C. § 767 (1970) (codified at 38 U.S.C. § 767(a) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981)); 38 C.F.R. § 9.3(a) (1981); VA Handbook, para. 4.03*a*, *b*. The instructions on eligibility appearing on VA Form 29–8713 are somewhat confusing in that they do not address IRR personnel and, contrary to applicable law and regulations, imply that assignment to the Retired Reserve is an eligibility requirement for retiree coverage. *See* VA *id* at app. A, fig 12, para A. If full-time coverage as a unit member is continued beyond the 120-day period of eligibility because of total disability, *see* note 41 and accompanying text, *infra*, a one year period of eligibility applies; however, the additional one year period during which an application containing a completed health statement may be submitted runs from the termination of the member's unit coverage, which may be sooner than a full year beyond the date the member was separated or released from assignment or attachment to a unit. 38 C.F.R. § 9.3(b) (1981).

[30] 38 C.F.R. §§ 9.2(c), 9.3(b) (1981); VA Handbook, para. 4.03*c*.

[31] 38 C.F.R. §9.2(c) (1981); VA Handbook, para. 1.05*c*.

[32] 38 U.S.C. §§ 767(a)(3), 768(a)(5) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. § 9.1(a)(3) (1981); VA Handbook, para. 1.06*a*(2); AR 608–2, para. 2–15*b*(3).

[33] *See* VA Handbook, app. A, fig. 12, para. B; (para. B thereof) AR 608–2, para. 2–13*c*.

[34] *See* VA Handbook, app. A, fig. 12, para. B. If death should occur before the necessary documents are submitted to OSGLI, the life insurance applied for less any unpaid premiums to the date of death will be paid upon subsequent proof of the member's eligibility for retiree coverage. *See* 38 U.S.C. § 769(a)(4) (1976); 38 C.F.R. §9.10(c) (1981).

[35] *See* 38 U.S.C. § 767(a) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. §9.4

V. Part-time Coverage for Certain IRR Personnel

Members of the IRR who are not eligible for full-time coverage by reason of attachment to units for training are nevertheless covered by SGLI on a part-time basis for various periods of military duty. Part-time coverage applies to such personnel during annual training, active duty or active duty for training for not more than thirty days, and brief periods of inactive duty training scheduled in advance by competent authority to begin at a specific time or place, such as on-site instruction for Reserve judge advocates by Judge Advocate General's School instructors, but not during work or study in connection with correspondence courses or while attending educational institutions in an inactive status.[36]

Part-time coverage only applies during the specific duty periods indicated above and while the member is proceeding directly to or returning directly from the duty site.[37] Nevertheless, part-time coverage for periods of annual training and active duty for training for not more than thirty days applies around-the-clock for all duty days even if all travel is completed within any such period.[38] As with full-time coverages other than retiree coverage, part-time coverage is automatically for the maximum amount of $35,000 unless declined or canceled in increments of $5,000.[39]

VI. Coverage Extended for Disability

If at the time a reservist or guardsman is separated or released from an extended period of active duty or active duty for training, *i.e.*, duty pursuant to orders that do not specify a period of thirty days or less, he or she is totally disabled, as determined by the Administrator of Veterans' Affairs, and such disability persists throughout the 120-day period during which full-time SGLI coverage normally continues in effect, full-time coverage will continue beyond the 120-day period until the member ceases to be totally disabled or until the expiration of one year following the date of separation or release from duty, whichever first occurs.[40]

(1981); VA Handbook, para. 1.04*d;* AR 608-2, para. 2-2*b*. Reserve retirees with SGLI coverage in force on 1 December 1981 or who reinstate previously lapsed coverage by 1 December 1982 may obtain increased SGLI coverage up to the new maximum of $35,000 by submitting a written application to OSGLI by 1 December 1982. *See* 10 U.S.C. § 767(d) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981). Subject to the normal termination of retiree coverage at age 61 or upon receipt of the first increment of retired pay after reaching age 60, previously lapsed retiree coverage may be reinstated to any time within three years after the date of lapse. VA Handbook, para. 4.04.

[36] 38 U.S.C. §§ 765(1)(A), (2)(A), (D), (3), (5)(A), 767(a)(1), 768(a)(2), (3) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. §§ 9.1(a)(1), (b)(1), (d)(1), (4), (e), 9.5(b)(1), (2) (1981); VA Handbook, paras. 1.02*a*(1), *b*(1), *d*(1), (4), *e*, 1.03*c*(1), 1.05*b*, 1.06*b*; AR 608-2, para. 2-12*e*.

[37] 38 U.S.C. §§ 767(a)(1), 768(a)(2), (3) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. § 9.5(b)(1), (2) (1981); VA Handbook, paras. 1.05*b*, 1.06*b*; AR 608-2, para. 2-15*a*(1), (2), *b*(2).

[38] 38 U.S.C. § 768(a)(2) (1976); 38 C.F.R. §9.5(b)(1) (1981); VA Handbook, para. 1.06*b*(1); AR 608-2, para. 2-15*b*(2)*(a)*.

[39] 38 U.S.C. § 767(a)(1) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. §§ 9.4, 9.6(a) (1981); VA Handbook, paras. 1.04*d*, 3.02; AR 608-2, paras. 2-5*b*, 2-13*a*.

[40] 38 U.S.C. § 768(a)(1)(A) (1976); 38 C.F.R. §§ 9.5(a), 9.7(a)(1) (1981); VA Handbook, para. 1.07*a*; AR 608-2, para. 2-15*c*(1). For a discussion of full-time SGLI coverage in the case of reservists and guardsmen on extended periods of active duty, *see* notes 13-19 and accompanying text, *supra*. The term "total disability" is defined at 38 C.F.R. § 9.1(r) (1981) as follows:

> . . . any impairment of mind or body which continuously renders it impossible for the insured to follow any substantially gainful occupation. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, of both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the total loss of hearing of both ears, or the organic loss of speech shall be deemed to be total disability. Organic loss of speech will mean the loss of the ability to express oneself, both by voice and whisper, through the normal organs of speech if such loss is caused by organic changes in such organs. Where such loss exists, the fact that some

Similarly, in the case of unit personnel or IRR personnel attached to units for training, full-time SGLI coverage continues for up to one year beyond the date of separation or release from unit assignment or attachment if on the date of separation or release the member is totally disabled.[41] In either case, the continued coverage is without additional cost to the member.

The continuation of part-time coverage for disability in the case of IRR members performing brief periods of active duty or active duty for training or inactive duty training scheduled in advance by competent authority is somewhat more restrictive.[42] If, during such a period of duty, an IRR member not attached to a unit for training incurs a disability or aggravates a preexisting disability and is rendered unisurable at standard premium rates approved by the Veterans Administration, part-time SGLI coverage is continued for 120 days beyond the date on which it would otherwise terminate, and, if the member should die during the 120-day period of extended coverage, life insurance proceeds are payable, but only if the claimant/beneficiary is able to establish that death resulted from the incurred or aggravated disability.[43]

speech can be produced through the use of an artificial appliance or other organs of the body will be disregarded.

[41] 38 U.S.C. § 768(a)(4)(A) (1976); 38 C.F.R. §§ 9.5(a), 9.7(a)(1) (1981); VA Handbook, para. 1.07*a*; AR 608-2, para. 2-15*c*(1). For a discussion of full-time SGLI coverage in the case of reserve component personnel who are assigned to units or attached to units for training, *see* notes 20-23 and accompanying text, *supra*. There is no provision for extending retiree coverage for disability existing when that coverage would otherwise terminate. For a discussion of full-time SGLI coverage for reserve component retirees, *see* notes 24-35 and accompanying text, *supra*.

[42] For a discussion of part-time SGLI coverage applicable to IRR personnel during brief periods of duty, *see* notes 36-39 and accompanying text, *supra*.

[43] 38 U.S.C. §§ 767(b), 768(a)(2), (3) (1976); 38 C.F.R. §§ 9.5(b), 9.7(b) (1981); VA Handbook, para. 1.07*b*; AR 608-2, para. 2-15*c*(2). The term "disability" means "any type of injury or disease whether mental or physical." *See* 38 C.F.R. § 9.1(q) (1981).

VII. Veterans' Group Life Insurance

Veterans' Group Life Insurance (VGLI) may be viewed by reservists and guardsmen as the active components' *quid pro quo* for retiree SGLI coverage since it permits the replacement of SGLI coverage in force upon separation from service with an equal amount of five year nonrenewable group term life insurance that may be converted to an individual policy other than term insurance with a participating commercial insurer of the insured's choice without further proof of insurability at the end of the five year term.[44] VGLI, however, is also important to members of the reserve components in several respects.

First, while VGLI is not available to retired reservists and guardsmen or to unit personnel, the legislation which gave birth to it[45] authorizes reservists and guardsmen who have full-time SGLI coverage and become eligible to continue that coverage as retiree coverage to discontinue their SGLI and to convert it to an individual policy of life insurance other than term insurance with a participating commercial insurer of their own choice without further proof of insurability.[46] Accordingly, unit members in the reserve components have a choice when separated or released from unit assign-

[44] 38 U.S.C. §§ 768(b), 777(a), (b), (e) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. §§ 9.3(c), 9.26(a)(1), (3), (b) (1981); VA Handbook, paras. 8.01*a*, *b*, 8.02*a*, 8.05*b*, *c*, 8.09*a*; AR 608-2, paras. 3-1*a*, *b*, 3-3*a*.

[45] Pub. L. No. 93-289, 88 Stat. 165 (1974).

[46] *See* 38 U.S.C. §§ 768(b), 777(e) (1976); 38 C.F.R. § 9.26(b), (d) (1981); VA Handbook, paras. 8.01*c*, 8.09*d*; AR 608-2, para. 3-1*c*. *See also* 38 U.S.C. § 768(a)(4)(B) (1976) which denies SGLI retiree coverage to reservists and guardsmen who upon qualifying for retirement have converted their SGLI coverage to individual policies with commercial insurers. The option to discontinue SGLI coverage at retirement in exchange for an individual policy is not available to members of the IRR having no full-time coverage in force upon completion of 20 years of qualifying service for retirement purposes. Since part-time coverage is intermittent, such members have no SGLI coverage which "could be continued in force under section 768(a)(4)(B) of this title." *Id.*

ment or attachment after qualifying for retirement. Aside from discontinuing coverage altogether, they may either continue their SGLI term coverage or purchase permanent insurance which builds cash and loan value and, depending upon the issuing company, may even pay policy dividends.

Second, if a member of the IRR having part-time SGLI coverage suffers a service-connected injury or disability or aggravates a preexisting injury or disability while on active duty, or active duty for training under orders specifying a period not exceeding thirty days, or while on inactive duty training scheduled in advance by competent authority, or while traveling directly to or from any such period of duty, and is thereby rendered uninsurable at standard premium rates approved by the Veterans Administration, the member may apply for VGLI, which includes the privilege of conversion to a commercial policy, other than term insurance, at the end of the 5-year term, during the 120-day period of extended SGLI coverage for death resulting from such service-connected injury or disability.[47] IRR personnel who desire VGLI coverage because of what they believe to be a qualifying injury or disability should write OSGLI as soon as possible within the 120-day eligibility period. OSGLI will then provide information on how to obtain VGLI coverage.[48] If an eligible member pays the initial premium and submits proof of disability during the 120-day eligibility period, VGLI becomes effective on the 121st day following termination of the duty period, *i.e.*, on the day following termination of limited, part-time SGLI coverage.[49] The amount of VGLI coverage which maybe sought is limited to the amount of SGLI coverage the member had in force at the time of the injury or disability.[50]

Third, unit personnel having full-time SGLI coverage, including IRR personnel assigned or attached to units for training, may also apply for VGLI if they sustain a service-connected injury or disability while on active duty or active duty for training under orders specifying a period not exceeding thirty days or while on inactive duty training scheduled in advance by competent authority or while traveling directly to or from any such period of duty, but not if full-time SGLI coverage is terminated.[51] Unit personnel who desire VGLI coverage because of what they believe to be a qualifying injury or disability should write OSGLI for information as soon as it appears their unit status and full-time SGLI coverage will be terminating as a result of their physical condition.[52] As a practical matter, unit personnel injured on duty normally retain their unit status and full-time SGLI coverage unless they are also totally disabled. If a totally disabling condition resulting from a service-connected injury also renders a unit member uninsurable at standard premium rates approved by the Veterans Administration, any VGLI applied for will not become effective until the day after full-time SGLI coverage terminates.[53]

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[47] 38 U.S.C. § 768(b) (1976); 38 C.F.R. §§ 9.3(d), 9.26(a)(2), (b) (1981); VA Handbook, paras. 8.02*b*, 8.03*b*(1), 8.09*a*; AR 608-2, para. 3-3*b*. For the continuation of part-time coverage for disability in the case of IRR members, *see* notes 42-43 and accompanying text, *supra*.

[48] VA Handbook, para. 8.03*b*(2).

[49] 38 U.S.C. § 768(b) (1976); 38 C.F.R. §§ 9.3(d), 9.26(a)(2) (1981); VA Handbook, para. 8.04*b*. A member of the IRR qualifying for VGLI by being rendered uninsurable at standard premium rates because of an injury or disability suffered while performing a brief period of duty may be required to undergo a medical examination or to provide other evidence of uninsurability at standard premium rates. *See* 38 C.F.R. § 9.26(a)(3) (1981).

[50] 38 U.S.C. § 768(b) (1976); VA Handbook, para. 8.05*c*; AR 608-2, para. 3-2. Only by implication does 38 C.F.R. § 9.3(d) (1981) restrict the amount of VGLI coverage which may be applied for to the level of the member's prior SGLI coverage. *Cf. id.* at § 9.3(c) (1981).

[51] *See* VA Handbook, paras. 8.01*c*, 8.02*b*, 8.03*b*(1).

[52] *Cf. id.* at para. 8.03*b*(2).

[53] For the continuation of full-time SGLI coverage for up to one year following separation or release from unit assignment or attachment in the case of unit members who are totally disabled, *see* notes 40-41 and accompanying text, *supra*. As in the case of IRR personnel applying for VGLI, unit personnel who apply may be re-

Finally, if an individual is separated or released from an extended period of active duty, converts his or her SGLI to VGLI, and thereafter becomes covered again by SGLI as a unit member in a reserve component, the combined limitation on VGLI and SGLI coverage is $35,000. However, within 60 days of reacquiring SGLI coverage, the individual may convert all or part of the VGLI coverage to an individual policy with a participating commercial insurer of his or her own choice without further proof of insurability.[54]

VIII. Coverage Elections

Coverage and beneficiary elections and the choice of settlement options are made on VA Form 29–8286 in all cases except for retiree coverage and VGLI.[55] Similar elections and choices are made on VA Form 29–8713 in the case of retiree coverage[56] and, in the case of VGLI, on the appropriate VA Form 29–8714 supplied by OSGLI to inquiring, qualified reservists and guardsmen.[57]

Since maximum SGLI coverage is automatic in all cases other than retiree coverage, it is unnecessary for members to select a level of coverage on VA Form 29–8286. However, if a member wants to decline coverage altogether or to reduce the level of coverage in $5,000 increments, Part 1 of VA Form 29–8286 must be completed in the member's handwriting and signed, indicating, for example, "I want no insurance" or "I want only $15,000 of insurance."[58]

In completing VA Form 29–8713, retirees may apply for any level of insurance in $5,000 increments up to the $35,000 maximum without regard to whether they had maximum SGLI in force, or for that matter any SGLI in force, at the time of application.[59] In completing the appropriate VA Form 29–8714, applicants for VGLI are limited in the amount of coverage they may select to $5,000 increments not exceeding the amount of SGLI in force at the time they became eligible for VGLI.[60]

Reservists and guardsmen who have declined coverage or who have elected a reduced level of coverage may apply for coverage or to increase coverage in $5,000 increments to the $35,000 maximum.[61] Application is made through personnel and finance channels to OSGLI on VA Form 29–8285.[62] Such applications are subject

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quired to undergo a medical examination or to provide other evidence of uninsurability at standard premium rates. *See* 38 C.F.R. § 9.26(a)(3) (1981).

[54] 38 U.S.C. § 777 (a), (e) (1976), *as amended by* Pub. L. No. L. No. 97–66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. § 9.36(c) (1981); VA Handbook, paras. 8.04*a*, 8.05*d*.

[55] *Id.* at paras. 3.01*a*, *b*, 3.02, 5.06, app. A, figs. 7, 10; AR 608–2, paras. 2–5, 2–13*a*, 2–18, app. A, figs. A–3, A–6.

[56] VA Handbook, paras. 4.03*c*, *d*, *e*, 5.07*a*, app. A, figs. 21, 22; AR 608–2, para. 2–13*b*, app. A, figs. A–7, A–8. Copies of the current version of VA Form 29–8713 reflecting the increase in maximum coverage to $35,000 may be obtained from OSGLI. Retirees who have full-time SGLI coverage as unit members need only pay the initial monthly premium directly to OSGLI before their full-time coverage as unit members terminates in order to continue their coverage at retirement. *See* 38 C.F.R. § 9.3(b) (1981); VA Handbook, para. 4.03*c*; AR 608–2, para. 2–13*b*. It is nevertheless advisable for such retirees to apply on VA Form 29–8713 since beneficiary designations and any election of a mode of settlement made before separation or release from unit assignment or attachment are effective only during the period that unit coverage independently remains in force, normally 120 days, but for up to one year in the case of total disability. *See* VA Handbook, para. 1.09*a*(1)(*a*).

[57] *Id.* at app. A, figs. 13–20; AR 608–2, para. 3–4, app. A, figs. A–9 through A–12.

[58] VA Handbook, paras. 3.01*a*, *b*, 3.02, app. A, figs. 8, 9; AR 608–2, paras. 2–3, 2–5, 2–13*a*, app. A, figs. A–5, A–6.

[59] *See* 38 U.S.C. § 767(a)(3) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Sat. 1026 (1981).

[60] VA Handbook, para. 8.05*c*; AR 608–2, para. 3–2. *See also* 38 C.F.R. § 9.3(c), (d) (1981); note 50, *supra*.

[61] 38 U.S.C. § 767(c) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. § 9.8(c)(1) (1981); VA Handbook, para. 4.02*a*; AR 608–2, para. 2–9.

[62] VA Handbook, para. 4.02*b*, *c*, app. A, figs. 5, 6; AR 608–2, para. 2–9, app. A, figs. A–1, A–2. If VA Form

to underwriting for health, and in lieu of a physical examination, an applicant's commanding officer or equivalent superior must certify to the member's health on the face of the application.[63] While underwriting for health is infrequently a problem, particularly for younger personnel, it is one factor which should tend to discourage any reduction or waiver of automatic, maximum coverage.

Although a waiver or reduction of SGLI coverage by unit personnel on VA Form 29–8286 upon first becoming eligible is effective with the commencement of eligibility,[64] a subsequent waiver or reduction does not become effective until the first day of the calendar month following receipt of the completed VA Form 29–8286 by the custodian of the member's Military Personnel Records Jacket (MPRJ).[65] A restoration or increase of SGLI coverage, subject to approval by OSGLI, is effective upon the member's completion of new elections on VA Form 29–8286 and the completion by the member and his or her commander or equivalent superior of VA Form 29–8285.[66] Premiums are deducted from the member's pay pending action by OSGLI.[67] If the member's request to restore or increase SGLI coverage is not approved, premiums deducted from the member's pay for the insurance or increased insurance applied for are refunded to the member.[68]

A retiree whose coverage has lapsed for nonpayment of premiums may apply for reinstatement within three years of the date of lapse, and subject to conditions prescribed by the Administrator of Veterans' Affairs, including underwriting for health, lapsed coverage may be restored.[69] Similar criteria apply to the reinstatement of lapsed VGLI coverage, subject of course to the limited 5-year term of such coverage.[70]

IX. Beneficiary Designations and Death Claims

Persons covered by SGLI or VGLI may designate as primary or contingent beneficiary one or more persons, firms, corporations or legal entities, including the insured's estate or the trustee of an inter vivos or testamentary trust.[71] If two or more primary or contingent

29–8285 is not available, a letter containing similar information may be used. *See id.* at para. 2–9*a*, *b*, for detailed instructions as to the contents of such a letter.

[63] 38. U.S.C. 767(c) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981); VA Handbook, para. 4.02*b*; AR 608–2, para. 2–9.

[64] 38 C.F.R. § 9.6(a) (1981); VA Handbook, para. 3.01*a* AR 608–2, para. 2–5*a*.

[65] 38 C.F.R. § 9.6(b) (1981); VA Handbook, para. 3.01*b*; AR 608–2, para. 2–5*c*. Thus, if maximum coverage is in effect, it will continue until the end of the calendar month in which the member elects to cancel or reduce SGLI coverage, and if death occurs before the first day of the next calendar month, $35,000 of life insurance proceeds will become payable despite the submission of VA Form 29–8286 reducing or cancelling coverage. A reduction or waiver of part-time coverage is effective at the end of the last day of duty, or at the end of the period of inactive duty training, during which the member submits VA Form 29–8286 reducing or cancelling coverage, or upon receipt of VA Form 29–8286 if the member is not on duty on the date of receipt. *See* 38 C.F.R. § 9.6(c) (1981); VA Handbook, para. 3.02.

[66] 38 U.S.C. § 767(c) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981); 38 C.F.R. § 9.8(c) (1981); VA Handbook, para. 4.02*c*; AR 608–2, para. 2–9*c*.

[67] VA H–29–75–1, para. 4.02*c* (June 1979); AR 608–2, para. 2–9*c* (20 December 1976); DODPM, Table 7–4–1, Rule 4 (C62, 12 November 1980).

[68] VA Handbook, para. 4.02*c*; AR 608–2, para 2–9*e* DODPM, para. 70406 (C62, 12 Nov. 1980).

[69] *See* 38 U.S.C. §§ 767, 778 (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981); VA Handbook, para. 4.04.

[70] *See* 38 U.S.C. §§ 767(c), 777(b)(4), 778 (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981); VA Handbook, para. 8.11.

[71] 38 U.S.C. § 770(a) (1976); 38 C.F.R. § 9.16(a) (1981); VA Handbook, paras. 5.01, 8.08*a*; AR 608–2, paras. 2–18, 2–26*a*. The designation of a minor as beneficiary of SGLI may be viewed as an improvident designation requiring counseling. *See* VA Handbook, para. 5.03*b*; AR 608–2, paras. 2–11*c* (20 December 1976), 2–22*d* (IC 171230Z February 1977). Although the designation of a spouse who is a minor presents no problem under state law, *see* 38 U.S.C. § 770(f) (1976), it is generally advisable to refrain from designating minors as benefi-

beneficiaries are named, the fractional interest of each should be indicated on the appropriate form.[72]

In lieu of naming specific beneficiaries, members may simply direct the payment of proceeds "by law."[73] If proceeds are payable "by law," or if an insured is not survived by any designated primary or contingent beneficiary or fails to designate a beneficiary, the proceeds of SGLI or VGLI are payable in the following statutory order of precedence:

1. To the widow or widower of the insured;
2. Absent a widow or widower, to the child or children of the insured *per stirpes*;
3. If none of the above, to the parents of the insured in equal shares, or all to the surviving parent of the insured;
4. If none of the above, to the duly appointed executor or administrator of the insured's estate; and
5. If none of the above, to the insured's next of kin according to the law of the insured's state or other jurisdiction of domicile at death.[74]

Legal questions sometimes arise as to who is the widow or widower of the insured or the child or parent of the insured. In general, a widow or widower is the insured's lawful spouse at the time of death.[75] The insured's child includes a legitimate, legally adopted, or in some cases an illegitimate child,[76] The insured's parent includes a parent by legal adoption of the insured.[77] In addition, where benefi-

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ciaries because of their disability under state law. *See* VA Handbook, para. 5.04*b*. An alternative would be to establish an inter vivos trust to administer the proceeds for beneficiaries who are minors, or to execute a will containing such a trust, and then to name the trustee as beneficiary. The designation of a trustee as beneficiary, particularly a testamentary trustee, may be viewed as an unusual designation requiring counseling. *See id.* at para. 5.04*b*; AR 608-2, paras. 2-11*b* (20 December 1976), 2-22*c* (IC 171230Z Feb. 1977). Nevertheless, such a designation, motivated by estate planning considerations, is perfectly valid. The assignment of ownership of life insurance coverage is also sometimes motivated by estate planning considerations; however, assignments of SGLI and VGLI are not permitted. 38 C.F.R. § 9.20 (1981); VA Handbook, para. 1.12.

[72] *Id.* at para. 5.06*b*(4), app. A, figs. 7, 11, 13; AR 608-2, para. 2-26*a*. Concerning the designation of multiple primary and contingent beneficiaries, the various VA forms contain the following provision implementing 38 C.F.R. § 9.18(e) (1981) with respect to the payment of proceeds to multiple beneficiaries:

> NOTE: If more than one principal beneficiary is named, the share of any such beneficiary who dies before me [the insured] shall be distributed equally among the surviving principal beneficiaries. If there is no surviving principal beneficiary, the proceeds shall be distributed equally ["or as specified" added in VA Forms 29-8713 and 29-8714] to the surviving contingent beneficiaries. This Designation of Beneficiary shall be void if none of the designated beneficiaries is ["are" substituted for "is" in VA Forms 29-8713 and 29-8714] living at my death. If after completion of this form my insurance is increased, this beneficiary designation shall apply to the full amount in force unless a new designation is made.

[73] VA Handbook, paras. 5.06*b*(1), 5.07*a*, 8.08*a*; AR 608-2, paras. 2-5, 2-27.

[74] 38 U.S.C. § 770(a) (1976); 38 C.F.R. § 9.16(i) (1981); VA Handbook, para. 5.02; AR 608-2, para. 2-27. Use of the "by law" designation should be discouraged, especially in cases where the insured wants the proceeds paid to persons who would take under such a designation such as the insured's spouse or, if none, the insured's children. When a "by law" designation is used, OSGLI must take extra steps to verify the identity of the beneficiary or beneficiaries, and the payment of the claim may be delayed.

[75] 38 U.S.C. § 765(7) (1976); 38 C.F.R. § 9.1(s)(1) (1981).

[76] 38 U.S.C. § 765(8) (1976); 38 C.F.R. § 9.1(s)(2) (1981). If the insured is the mother of an illegitimate child, the child qualifies as a beneficiary under the statutory order of precedence. However, an illegitimate child qualifies as to an insured who is alleged to be its father only if there is some proof of paternity such as the insured's acknowledgment of the child in a signed writing or a judicial order compelling the insured to support the child.

[77] 38 U.S.C. § 765(9) (1976); 38 C.F.R. § 9.1(s)(3) (1981). If the insured is an illegitimate child, the insured's natural mother qualifies as a parent; however, the insured's natural father qualifies only if there is a judicial determination of paternity or some evidence of paternity such as a written acknowledgment of the insured signed by the father before the insured's death. In addition, any parent who abandoned or willfully

ciary questions involving conflicts between state law and federal law authorizing SGLI have arisen, federal law has been viewed as preempting state law.[78]

An insured under SGLI or VGLI may change beneficiary designations at any time by completing and submitting the beneficiary portion of VA Form 29-8286 or, in cases involving retiree coverage or VGLI, by completing and submitting VA Form 29-8721.[79] When SGLI coverage continues beyond separation or release from active duty, active duty for training, or assignment or attachment to a unit, beneficiary changes may be made by letter over the insured's signature mailed to OSGLI requesting the change and indicating that the change applies to the period of continued coverage, i.e., one year in cases of total disability and 120 days in cases of separation or release from active duty, active duty for training or assignment or attachment to a unit or in cases of disability incurred or aggravated during a brief period of duty.[80] A designation or change of beneficiary does not become effective until it is received by the custodian of the insured's MPRJ or by OSGLI, as appropriate, before the insured's death.[81]

In general, death claims under SGLI and VGLI are made on VA Form 29-8283 which the beneficiary submits with the death certificate as proof of death to OSGLI.[82] Despite an appropriate designation of beneficiary, occasionally no claim is made following the death of an insured under SGLI or VGLI. If no claim is made within one year after the insured's death or if payment to the person in line to receive the proceeds is prohibited by federal statute or regulation, payment will be made according to the statutory order of precedence as if the named or silent beneficiary had predeceased the insured.[83] If no payment has been made or any claim received within two years of the insured's death, the Administrator of Veterans' Affairs is given discretion to make payment to a claimant who is "equitably entitled" to the proceeds.[84] Finally, if no payment has been made or any claim received within four years of the insured's death, the proceeds escheat to the Servicemen's Group Life Insurance Fund, a revolving fund in the Treasury of the United States out of which for SGLI, retiree SGLI, and VGLI are payable to the insurer.[85]

X. Settlement Options

Unlike most life insurance coverage, only two settlement options are available under SGLI and VGLI: (1) a single, lump sum pay-

failed to support the insured during minority or consented to the insured's adoption by another does not qualify as a beneficiary under the statutory order of precedence.

[78] *See, e.g.*, Stratton v. Servicemen's Group Life Ins. Co., 422, F. Supp. 1119 (S.D. Iowa 1976); Johnson v. Prudential Ins. Co. of America, 182 Neb. 673, 156 N.W. 2d 812 (1968); Davenport v. Servicemen's Group Life Ins. Co., 119 Ga. App. 685, 168 S.E. 2d 621 (1969). Any doubt as to federal preemption over state law, at least insofar as beneficiary designations are concerned, was resolved by the Supreme Court of the United States in Ridgway v. Ridgway, ___ U.S. ___, 102 S.Ct. 49 (1981).

[79] *See* 38 C.F.R. § 9.16(e) (1981); VA Handbook, paras. 5.05*a*, 5.06*a*, 5.07*b,c*; AR 608-2, para. 2-28*a*. The insured's last will and testament is not an appropriate document in which to designate a change of beneficiary since it would not be received by the custodian of the insured's MPRJ or by OSGLI prior to the insured's death. *See* 38 C.F.R. § 9.16(f) (1981).

[80] *See* AR 608-2, para. 2-28*c*. The level of coverage may not be reduced or increased during any such period of continued coverage, presumably because it has already been bought and paid for at the prior level. *Id.* at para. 2-10*a*(2).

[81] 38 C.F.R. § 9.16(d) (1981); VA Handbook, paras. 5.05*e*, 5.06*c*; AR 608-2, para. 2-28*d*.

[82] 38 C.F.R. § 9.18(a) (1981); VA Handbook, paras. 7.01*a,b*, 7.02, 7.03*a*, 8.10.

[83] 38 C.F.R. §§ 770(b), 777(d) (1976); 38 C.F.R. § 9.18(b) (1981); VA Handbook, para. 7.06*a*.

[84] 38 U.S.C. §§ 770(c), 777(d) (1976); 38 C.F.R. § 9.18(c) (1981); VA Handbook, para. 7.06*b*.

[85] 38 U.S.C. §§ 769(d), 770(c), 777(d) (1976); 38 C.F.R. §§ 9.14, 9.18(d) (1981); VA Handbook, para. 7.06*c*. Apparently, premiums for retiree SGLI and VGLI paid directly to OSGLI are deposited in the Servicemen's Group Life Insurance Fund or deducted as a credit against premiums otherwise payable out of the Fund.

ment, and (2) monthly installments for thirty-six months.[86] If the insured does not elect the installment option when making a beneficiary designation, the beneficiary has the right to do so following the death of the insured.[87] On the other hand, if the insured has elected the installment option, the beneficiary is not permitted to elect a lump sum settlement.[88] Since benefits under SGLI and VGLI are exempt from taxation,[89] the usual federal income tax advantage derived from an installment settlement does not apply.[90]

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[86] 38 U.S.C. § 770(d) (1976); 38 C.F.R. § 9.16(j) (1981) VA Handbook, paras. 6.01*a*, 8.08*a*, app. A, fig. 10, para. D, fig. 12, para. F, fig. 14 para. E. Life insurance policies sold commercially normally offer a variety of optional modes of settlement including annuity options providing for payments for the life of the beneficiary. The limitation on settlement options for SGLI and VGLI may simply reflect the fact that $35,000 of the life insurance protection is not very much and, at least in the case of SGLI in time of war, the fact that proceeds are most likely to become payable to widows who are comparatively young, with the result that installment payments for life would be very small. It should be noted, however, that when SGLI or VGLI proceeds are paid under the 36-month installment option, the first installment is payable as of the date of death, and each payment includes an interest element with the result that monthly payments will exceed 1/36th of the proceeds payable. This sum can be as high as $972.22 monthly if maximum coverage was in effect upon the insured's death. *See* 38 C.F.R. § 9.18(f) (1981); VA Handbook, para. 7.06*d*.

[87] 38 U.S.C. § 770(d) (1976); 38 C.F.R. § 9.16(j) (1981); VA Handbook, paras. 6.01*b*, *c*, 8.08*a*, app. A, fig. 10 para. D, fig. 12, para. F, fig. 14, para. E. If an insured elects the installment option and the beneficiary dies while SGLI or VGLI proceeds are still being paid, the remaining payments are made to any surviving contingent beneficiary designated by the insured as such payments become due. In all other cases involving the death of a beneficiary, including where the beneficiary has elected the installment option, the commuted value of the remaining payments, *i.e.*, the remaining payments excluding the interest which would have accrued, is paid to the beneficiary's estate. 38 C.F.R. § 9.18(g) (1981); VA Handbook, para. 7.06*e*. Also, where the beneficiary elects the installment option, the election is not irrevocable. Upon request, the beneficiary will be paid the commuted value of the then remaining payments. 38 C.F.R. § 9.18(h) (1981).

[88] *See* VA Handbook, para. 6.01*d*.

[89] 38 U.S.C. § 770(g) (1976); 38 C.F.R. § 9.17 (1981); VA Handbook, para. 1.12. The tax exemption for SGLI and VGLI "[p]ayments of benefits" applies to the interest element of installment payments which would otherwise be included in gross income under I.R.C. § 101(d)(1). The tax exemption for SGLI and VGLI benefits for federal income tax purposes would be unnecessary if this were not so since life insurance proceeds are generally excluded from gross income. *See* I.R.C. § 101(a)(1), (d)(1)(A). On the theory that federal law preempts state law with the respect to SGLI and VGLI, *see* note 78 and accompanying text, *supra* the tax exemption for benefits should apply with equal force for state income tax purpose. While the tax exemption also seems to apply to state death taxes imposed upon recipients of transfers at death, it would not seem to shield the proceeds from federal and state estate taxation not imposed upon the "[p]ayments of benefits . . . to, or on account of, a beneficiary." Any interest paid because of a delay in the payment of a lump sum settlement, commonly referred to as "delayed settlement interest", is not a payment of SGLI or VGLI benefits and is, therefore, taxable under I.R.C. § 61(a)(4). Concern is sometimes expressed that the interest element of SGLI and VGLI installment settlement payments may not be perceived as an insurance benefit and would, therefore, be taxable. *Cf.* Rev. Rul. 57-441, 1957-2 C.B. 45 (holding under a National Service Life Insurance policy, a form of government insurance provided during the 1940's, that interest paid on dividend accumulations is taxable). Nevertheless, the tax exemption for the interest element of installments under SGLI and VGLI seems clear. The dividend accumulations considered in Rev. Rul. 57-441 closely resemble a bank account on which interest clearly would be taxable. Moreover, aside from delayed settlement interest which is clearly taxable, the interest element of installments is the only other element of SGLI or VGLI payments that the tax exemption could possibly apply to. Finally, the Internal Revenue Service has considered a similar tax exemption provision applicable to other benefits administered by the Veterans Administration such as compensation, pension, hospitalization and burial benefits, and has held them to be excludable from gross income. *See* Rev. Rul. 72-605, 1972-2 C.B. 35.

[90] Absent the tax exemption for SGLI and VGLI benefits, there would be a federal income tax advantage to installment payments to a beneficiary who is the surviving spouse of an insured since an amount not exceeding $1,000 of the interest element of such payments, but not interest payments under an interest only option, under all policies on the insured's life is excludable from the surviving spouse's income annually. *See* I.R.C. § 101(c), (d)(1)(B), (4). Of course, this income tax advantage with respect to other life insurance payable in installments is available regardless of whether

XI. Premiums

The monthly premiums the insured is required to pay for full-time SGLI, retiree SGLI or VGLI coverage are quite nominal in amount. For full-time, maximum SGLI coverage, a reservist or guardsman pays $5.25 per month at a rate of $.15 per $1,000 of coverage per month.[91] The premiums for retiree coverage vary by age, maximum coverage costing $10.50 per month through age 39, $14.00 per month from age 40 through age 49, and $17.50 per month for age 50 and over.[92] For VGLI, monthly premiums for the entire 5-year term are generally determined according to the age of the insured at the time coverage becomes effective, maximum coverage costing $5.95 per month in the case of coverage commencing before the insured reaches age 35 and $11.90 per month for coverage commencing at age 35 or over.[93] The premium rates for SGLI prior to retirement are average rates for the entire covered group, and this results from the statutory requirement that such premiums be the same for all ages.[94]

Premiums for retiree SGLI coverage and for VGLI coverage are payable directly to OSGLI.[95] Upon receipt of a completed application for VGLI (and presumably for retiree SGLI as well) and the first month's premium,

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the insured or the beneficiary-spouse elects to receive SGLI or VGLI proceeds in installments.

[91] The premium quoted in the text is based upon the monthly rate per $1,000 of full-time SGLI coverage in effect prior to 1 December 1981. *See* VA Handbook, para 1.08*d*; DODPM, para. 70405 (C62, 12 Nov. 1980). Because the cost of SGLI is generally borne by the personnel insured, except in time of war, *see* note 12 and accompanying text, *supra*, there was no reason to believe that the increase in maximum coverage from $20,000 to $35,000 which became effective 1 December 1981 pursuant to Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981), would effect any change in the monthly premium rate per $1,000 of coverage and indeed there has been no change in such monthly premium rate. In fact, press reports of the enactment of the increase generally indicate that the costs per $1,000 for SGLI and VGLI coverages remain unchanged. *See, e.g.*, Army Times, 2 November 1981, at 35, col. 2, 19 October 1981, at 1, col 2. It should be noted that AR 608-2, Table 2 (20 December 1976), was never updated to reflect the reduction in the monthly premium rates from $.17 to $.15 per $1,000 of full-time SGLI coverage effective 1 July 1978.

[92] The premium rates accrue at $.50 per $1,000 of coverage per month for those aged 50 and over, at $.40 per $1,000 for those aged 40 through 49, and at $.30 per month for those aged 39 and younger. *See* VA Handbook, para. 108*e*. *See also* Army Times, 2 Nov. 1981, at 35, col. 2. The incremental increases in premiums for retiree SGLI coverage become effective on the coverage anniversary date following the insured's 40th and 50th birthdays. Thus, for example, if the insured's birthday is on March 30th and if the coverage anniversary date is October 15th, the increasures will become effective on October 15th, not March 30th, of the years in which the insured attains ages 40 and 50.

[93] The premium rate accrue at $.17 per $1,000 of coverage per month for those aged under 35 and at $.34 per $1,000 for those aged 35 and older. *See* VA Handbook, para. 8.06*b*. *See also* Army Times, 2 Nov. 1981, at 35, col. 2. It should be noted that the Army Times article erroneously fails to mention the monthly premium for VGLI commencing on or after the insured's 35th birthday.

[94] *See* 38 U.S.C. § 769(a)(1) (1976). The Internal Revenue Service has published 1-year term insurance rates in order to inpute income to employees for life insurance protection under tax qualified retirement plans. *See* Rev. Rul. 55-747, 1955-2 C.B. 228. In the insurance industry, these rates are commonly known as "P.S. 58 rates," the reference being to the document in which they were first published. On the theory that P.S. 58 rates are roughly equivalent to commercial insurance rates for 1-year term insurance, the table that follows compares the P.S. 58 rates, converted to a monthly basis, at five-year intervals with the monthly premium rates per $1,000 of coverage for SGLI and VGLI. It must be emphasized that P.S. 58 rates bear no direct relationship to the premiums charged by any insurer.

Age	P.S. 58	Full-time SGLI	Retiree SGLI	5-year term VGLI
20	.13	.15	—	.17
25	.16	.15	—	.17
30	.20	.15	—	.17
35	.27	.15	.30	.17/.34
40	.37	.15	.40	.34
45	.53	.15	.40	.34
50	.77	.15	.50	.34
55	1.15	.15	.50	.34
60	1.73	.15	.50	.34

[95] 38 U.S.C. §§ 769(e), 777(c) (1976); 38 C.F.R. § 9.10(d) (1981); VA Handbook, paras. 1.08c, 8.06*a*.

OSGLI sends the insured monthly payment coupons for use in paying subsequent premiums.[96] Premiums for full-time SGLI coverage are deducted from the member's monthly pay.[97] In the case of the full-time SGLI coverage for IRR personnel attached to units for training without pay, monthly premiums are collected according to procedures established by U.S. Army Reserve Components Personnel and Administration Center.[98] In any event, premiums that have not been collected or deducted from pay through administrative oversight or otherwise are deducted from the insurance proceeds payable in the event of death.[99] SGLI premiums cannot be prorated or reduced if coverage is provided for less than a full calendar month.[100]

For part-time maximum coverage the premium is $3.50 payable annually.[101] This small premium is normally collected from the member's pay for annual training,[102] which for IRR personnel may be the only pay the member receives in the course of a year. Since finance and accounting procedures require the collection of premiums for part-time SGLI coverage whenever a covered member performs annual training or active duty for training for not more than thirty days, members who have already paid for a particular fiscal year must present proof of payment, such as a leave and earnings statement or military pay voucher, at subsequent training sites in order to avoid the deduction of premiums from pay.[103]

XII. Conclusion: An Historical Overview of SGLI

Government life insurance programs were made available to members of the armed forces in connection with World War I, World War II and the Korean conflict.[104] First authorized in 1965, SGLI was the government's insurance program, provided through a commercial insurer, for members of the armed forces in the Vientam era.[105] It has since become an ongoing program of particular importance to the reserve components of the Army.

SGLI originally provided maximum coverage of $10,000 for reservists and guardsmen only during extended periods of active duty, *i.e.*, pursuant to orders not specifying a period of less than thirty-one days.[106] Thus, beginning in 1965, reservists and guardsmen had no SGLI coverage during periods of annual training, active duty for training for thirty days or less, or inactive duty training. In 1970, part-time coverage as it now applies to members of the IRR not attached to units for training[107] was provided for brief periods of duty such as annual training, active duty for training for thirty days or less, and inactive duty training scheduled in advance by competent authority.[108] In

[96] *See id.* at para. 8.06*a*.

[97] 38 U.S.C. § 769(a)(1), (2) (1976); 38 C.F.R. § 9.10(a) (1981); VA Handbook, para. 1.08*b*; AR 608-2, para. 2-17*a*(1), (2); DODPM, para. 70405 (C62, 12 Nov. 1980).

[98] AR 608-2, para. 2-17*b*(2).

[99] 38 U.S.C. § 769(a)(4) (1976); 38 C.F.R. § 9.10(c) (1981); VA Handbook, para. 1.08*g*.

[100] AR 608-2, para. 2-16.

[101] The premium quoted in the text is derived from the rate of $2.00 per fiscal year in effect for $20,000 of part-time SGLI coverage prior to 1 December 1981, *see* VA Handbook, para. 1.08*d* DODPM, para. 80365 (C62, 12 Nov. 1980), and the assumption that if maximum coverage is increased by 75%, there will be a corresponding percentage increase in annual premium.

[102] 38 U.S.C. § 769(a)(3) (1976); 38 C.F.R. § 9.10(b) (1980); VA Handbook, para. 1.08*b*; AR 608-2, para. 2-17*e*; DODPM, para. 80365 (C62, 12 Nov. 1980).

[103] AR 608-2, para. 2-17*e*

[104] *See* the historical review of life insurance programs administered by the Veterans Administration in S. Rep. No. 723, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 3117, 3119.

[105] *Id.* at 3120.

[106] *See* Pub. L. No. 89-214, § 1(a), 79 Stat. 880 (1965), *enacting* 38 U.S.C. §§ 765(1), 767(a), 768 (Supp. V 1965-1969) (current provisions at 38 U.S.C. §§ 765(1), 767(a), 768(a)(1) (1976), *as amended by* Pub. L. No. 97-66, § 401, 95 Stat. 1026 (1981)).

[107] *See* notes 36-39 and accompanying text, *supra*.

[108] *See* Pub. L. No. 91-291, §§ 1 to 3, 84 Stat. 326 (1970), *amending* 38 U.S.C. §§ 765, 767, 768 (Supp. V

addition, the maximum coverage was increased from $10,000 to $15,000.[109]

In 1974, SGLI came of age for reservists and guardsmen. In addition to an increase in the maximum coverage to $20,000,[110] unit members of the reserve components were automatically covered on a full-time basis,[111] and part-time coverage was continued for IRR personnel not attached to units for training.[112] In addition, unit personnel qualifying for retirement were given two options: (1) converting their SGLI coverage to an individual policy issued by a commercial insurer[113], and (2) continuing SGLI coverage until the commencement of retired pay at age 60.[114] VGLI was also created, providing insurance for reservists and guardsmen rendered uninsurable at standard premium rates because of a service-connected injury or disability.[115] Full-time coverage for unit members was regarded as desirable from the standpoint of recruiting and retention,[116] and retiree coverage was viewed as filling the gap between retirement, frequently in the mid-40's, and age 60.[117] Finally, the increase in maximum SGLI and VGLI coverages to $35,000 in 1981 was intended to preserve the value of the insurance program in light of a substantial increase of approximately 65 percent in the cost of living since 1974.[118]

Although SGLI falls short of serving all the life insurance needs of most reservists and guardsmen, it is an additional life insurance protection to any other coverage the member may have acquired individually or through civilian employment.[119] With the extension in 1978 of SBP coverage to reserve component personnel on an elective basis when they become eligible for retirement upon completing twenty years of qualifying service,[120] there is

1965–1969) (current pertinent provisions at 38 U.S.C. §§ 765(1), (2), (3), 767(a), (b), 768(a)(2), (3) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981)).

[109] *Id.* Pub. L. No. 91–291, § 2, 84 Stat. 326 (1970), *amending* 38 U.S.C. § 767(a) (Supp. V 1965–1969) (current provision at 38 U.S.C. § 767(a) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981)).

[110] *See* Pub. L. No. 93–289, § 4(1), 88 Stat. 165 (1974), *amending* 38 U.S.C. § 767(a) (1970) (current provision at 38 U.S.C. § 767(a) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981)).

[111] Pub. L. No. 93–289 §§ 3, 4(1), 5(a)(3), 88 Stat. 165 (1974), *amending* 38 U.S.C. §§ 765, 767, 768 (1970) (current pertinent provisions at 38 U.S.C. §§ 765(5)(B), 767(a)(2), 768(a)(4) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981)).

[112] *See* 38 U.S.C. §§ 765(1), (2), (3), 767(b), 768(a)(2), (3) (1976).

[113] *See* Pub. L. No. 93–289, §§ 3, 4(1), 5(a)(3), (4), 9(a), 88 Stat. 165 (1974), *amending* 38 U.S.C. §§ 765, 767, 768 (1970) (current pertinent provisions at 38 U.S.C. §§ 765(5)(C), 767(a)(4)(B), 768(b) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981)) *and enacting* 38 U.S.C. § 777(e) (1976).

[114] Pub. L. No. 93–289, §§ 3, 4(1), 5(a)(3), 88 Stat. 165 (1974), *amending* 38 U.S.C. §§ 765, 767, 768 (1970) (current pertinent provisions at 38 U.S.C. §§ 765(5)(C), 767(a)(3), 768(a)(5) (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981)).

[115] *Id.* §§ 5(a)(4), 9(a), *amending* 38 U.S.C. § 768(b) (1970) (current at 38 U.S.C. § 768(b) (1976)) *and enacting* 38 U.S.C. § 777 (1976), *as amended by* Pub. L. No. 97–66, § 401, 95 Stat. 1026 (1981).

[116] *See* S. Rep. No. 723, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 3117, 3124.

[117] *Id.* at 3125. At the time, married reserve component retirees were not covered by SBP until their retired pay commenced at age 60. *See* 10 U.S.C. § 1448(a) (Supp. V 1975) (current version at 10 U.S.C. § 1448(a) (Supp. IV 1980)).

[118] 127 Cong. Rec. H6834 (daily ed. 2 Oct. 1981) (remarks of Rep. Montgomery). The increase in SGLI and VGLI coverages was actively supported by the Department of Defense. MG R. Dean Tice, Deputy Assistant Secretary of Defense for Military Personnel Policy, was quoted as saying that the increase "would return viability to the insurance program as an estate item and improve the military compensation structure." *See* Army Times, 29 Jun. 1981, at 4, col. 1.

[119] In general, SGLI does not preclude the retention of any other private or government-sponsored life insurance, including other life insurance administered by the Veterans Administration. *See* VA Handbook, para. 1.04*e*; AR 608–2, para. 2–2*c*.

[120] *See*, Pub. L. No. 95–397, S 202(a), 92 Stat. 843 (1978), *amending* 10 U.S.C. § 1448(a) (1976), *codified* at 10 U.S.C. § 1448(a) (Supp. IV 1980)).

now a double layer of protection which reservists and guardsmen can look forward to from the time they retire from military service until they reach age 60. Although SGLI and SBP coverages only supplement other sources of financial protection for the families of reserve component personnel, they are at the very least, like Reserve and National Guard retired pay, a hedge against inflation and another good reason to pursue a career in the reserve components of the Army.

A Matter of Record

Notes from Government Appellate Division, USALSA

1. Records of Trial

Trial counsel must insure that each record of trial completely and accurately reflects the trial proceedings. All documents filed as exhibits or used during the arraignment should be included. This includes convening orders and any request for either trial by military judge alone or for enlisted members. While the trial judge or court members see the physical evidence, the Court of Military Review, which has fact-finding power, often must rely on photographs or descriptions. Trial counsel must thus insure that the substituted photographs or descriptions adequately depict the exhibit. While the use of a self-developing photograph is convenient, the resulting photograph is often virtually useless to the appellate courts. The use of local photographic offices to assist in preparing adequate photographic representations of the trial exhibits should not be overlooked.

2. Acquittal of Co-conspirator

Under current military law, the acquittal of appellant's sole alleged co-conspirator requires the disapproval of the finding of guilty of conspiracy against appellant. *United States v. Nathan*, 12 USCMA 398, 30 CMR 398 (1961); paragraph 160, Manual for Courts-Martial, United States, 1969 (Revised edition). The trend in civilian criminal law is toward a rejection of this common law rule and toward the rule expressed in the Model Penal Code. *See* Model Penal Code § 5.03, Comment (Tent. Draft No. 10, 1960). Since the Army Court of Military Review and convening authorities are bound by *Nathan*, any attempt to change the *Nathan* rule must be made before the United States Court of Military Appeals. In two cases recently decided by the Army Court of Military Review, the Government has requested The Judge Advocate General of the Army to certify the issue of the correctness of the current military rule. Counsel should remember that the *Nathan* rule cannot be applied to a situation in which the named co-conspirator is not tried or in which only some of the named co-conspirators are acquitted. Thus, of one of the co-conspirators named in the specification of conspiracy of which appellant is convicted has not been acquited, the *Nathan* rule is inapplicable.

Legal Assistance Items

Major Joel R. Alvarey, Major Walter B. Huffman, Major John F. Joyce, Major Harlan M. Heffelfinger, and Captain Timothy J. Grendell

Administrative and Civil Law Division, TJAGSA

Seminar on The Military Family

The American Bar Association's Family Law Section and Standing Committee on Legal Assistance for Military Personnel (LAMP) will cosponsor a seminar on The Military Family during the Association's annual meeting in San Francisco. The 3-hour presentation will be held

from 2 p.m. to 5 p.m. on Monday, 9 August 1982, at the Fairmont Hotel. The seminar will cover the following subjects:

1. The Military Family Resource Center.
2. Military Benefits for the Family.
3. Update on McCarty.
4. The Soldiers' and Sailors' Civil Relief Act and Jurisdiction; and an overview on Enforcement of Support.
5. The role of the Legal Assistance Officer and Divorce; Legal Ethics, Separation Agreements, Taxation.
6. Custody and Visitation and The Military Family.

The presentation will be augmented by written materials on each subject.

The Family Law Section and the LAMP Committee are seeking a broad based audience including civilian practitioners, active duty lawyers, and reservists.

Criminal Law News

Criminal Law Division, OTJAG

Post-trial Processing Time

Post-trial processing time was mentioned as a matter of concern at the last Worldwide JAG Conference. An analysis of statistical data recently released by USALSA indicates a continuing Army-wide trend towards longer processing times. In this regard, it should be noted that there is a Navy case, *United States v. Sutton*, pending before the Court of Military Appeals, in which the Court will consider whether the *Dunlap* 90-day rule should be reinstated. This office will be monitoring this area very closely in the future.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. **Meaningful Assignment of Reservists During Annual Training.** The annual training of Reservists is vitally important since it serves as an update and preparation for mobilization. Chief clerks and supervisors should be careful to assign them worthwhile tasks related to their mobilization responsibilities not only to provide professional satisfaction to the Reservists but also to give the Reservists favorable impressions which can be carried back to their home stations.

a. *Before the Reservist Arrives.* A complete schedule should be made which shows the exact location in which each individual will be placed.

b. *First Day.* Reservists should be treated like other new arrivals. They should have a meeting with their Staff Judge Advocate and supervisor before being escorted around the office for introductions. Afterwards, the supervisor should give the Reservist a more detailed overview of the office, its mission, and the Reservists' role and planned workload. The supervisor should make sure the NCO/EM knows the location of and becomes familiar with all of the major office items. The Reservist should not be given a desk in a secluded area, i.e., library, xerox room, etc. whenever possible, a work area which is in close proximity to the activities of the office should be set aside. Attention to detail will insure a positive attitude and better work performance.

c. *Duties for the Reservist.* All duties assigned to the Reservists should be channeled through their supervisors. Decentralized control over the NCO/EM will not only lead to confusing instructions and multiplicious assign-

ments, but they will begin to think of themselves as chattels. Reservists should be given assignments which are neither obvious makework nor such monumental projects that the Reservists will leave well before the task is completed. It is thus necessary to find out when they plan to depart and to then make assignments accordingly. These assignments should be significant enough to allow the Reservist some responsibility in budgeting time and effort to insure completion. While they should be adequately supervised, the supervisor should not duplicate the Reservists' efforts. Projects should be large enough that the Reservist will feel like he/she has accomplished something but not so complex that the tasks seem endless.

d. *Practical Apllication.* Supervisors should take it upon themselves to educate the Reservists in the working of the office, the Corps, and the Army. The supervisor should solicit suggestions and questions. Not only will this exchange of information better the Reservists' job performance, but also will make them more knowledgeable in the role and customs of the JAG Corps. Reservists should be encouraged to attend formations, award ceremeonies, and other activities in the unit or JAG office.

e. *End of Annual Training.* When the Reservists depart, don't just shake hands and forget them. Take them to lunch the last day and let them know you appreciated their help. If they perform outstandingly, say so by presenting or forwarding them a letter of commendation or other appropriate recognition through their chain of command.

2. Promotion.

Listed below are the 71D and 72E E-7 strengths:

71D Legal Clerks

	AUTHORIZED	*ASSIGNED*	*PERCENTAGE*
E7	142	278	195%

71E Court Reporters

E7	14	32	228%

Because of the overstrength in E7's there were only three individuals in the Corps selected for promotion to that grade during the recent board—two 71D legal clerks and one 71E court reporter.

Army Law Library Service

Developments, Doctrine & Literature Department, TJAGSA

1. Legal Publications Guides

Several CONUS installations have multiple law libraries. Most overseas GCM organizations have a main law library and smaller law libraries in branch offices. In both instances it would be helpful to users to have a master list of resources available in all of the law libraries on the installation. The appropriate office to do this is the staff judge advocate responsible for installation matters or the staff judge advocate of the overseas GCM organization. For example, the III Corps SJA recently published an official installation pamphlet listing all publications in law libraries on Fort Hood organized by alphabet and functional area. The location of each publication follows each listing and the pamphlet is updated bi-annually. The publications are listed alphabetically by title, but also include author, publisher, and year of publication where applicable.

Also, offices on installations with only one law library may find maintaining such a publications list helpful as a handy desk reference, particularly for newly assigned personnel.

2. West's Modern Legal Forms

The decision has been made not to purchase the new West's Modern Legal Forms series. Legal form books, published by TJAGSA, and maintained by all legal assistance offices will be the forms to be used in the future.

3. Error in Volume 11, Military Justice Reporter

Some copies of West's Military Justice Re-

porter, Volume 11, distributed in late April are missing the Key Number Index located at the back of the book. If your books are missing this material, contact West Publishing Co., 50 W. Kellogg Blvd., St. Paul, MN 55165, or call (612) 228-2695 for replacement copies.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

July 12–16: 4th Military Lawyer's Assistant (512–71D/20/30).

July 19–23: DAJA–IA Law of War Symposium

July 19–August 6: 25th Military Judge (5F–F33).

August 2–6: 11th Law Office Management (7A–713A).

August 9–20: 93d Contract Attorneys (5F–F10).

August 16–May 20, 1983: 31st Graduate Course (5–27–C22).

August 23–27: 6th Criminal Trial Advocacy (5F–F32).

September 1–3: 6th Criminal Law New Developments (5F–F35).

September 13–17: 20th Law of War Workshop (5F–F42).

September 20–24: 68th Senior Officer Legal Orientation (5F–F1).

October 5–8: 1982 Worldwide JAG Conference.

October 13–15: 4th Legal Aspects of Terrorism (5F–F43).

October 18–December 17: 99th Basic Course (5–27–C20).

October 18–21: 5th Claims (5F–F26).

October 25–29: 7th Criminal Trial Advocacy (5F–F32).

November 1–5: 21st Law of War Workshop (5F–F42).

November 2–5: 15th Fiscal Law (5F–F12).

November 15–19: 22d Federal Labor Relations (5F–F22).

November 29–December 3: 11th Legal Assistance (5F–F23).

December 6–17: 94th Contract Attorneys (5F–F10).

January 6–8: Army National Guard Mobilization Planning Workshop.

January 10–14: 1983 Contract Law Symposium (5F–F11).

January 10–14: 4th Administration Law for Military Installations (Phase I) (5F–F24).

January 17–21: 4th Administrative Law for Military Installations (Phase II) (5F–F24).

January 17–21: 69th Senior Officer Legal Orientation (5F–F1).

January 24–28: 23d Federal Labor Relations (5F–F22).

January 24–April 1: 100th Basic Course (5–27–C20).

February 7–11: 8th Criminal Trial Advocacy (5F–F32).

February 14–18: 22nd Law of War Workshop (5F–F42).

February 28–March 11: 95th Contract Attorneys (5F–F10).

March 14–18: 12th Legal Assistance (5F–F23).

March 21–25: 23d Law of War Workshop (5F–F42).

March 28–30: 1st Advanced Law of War Seminar (5F–F45).

April 6–8: JAG USAR Workshop.

April 11–15: 2nd Claims, Litigation, and Remedies (5F–F13).

April 11–15: 70th Senior Officer Legal Orientation (5F–F1).

April 18–20: 5th Contract Attorneys Workshop (5F–F15).

April 25–29: 13th Staff Judge Advocate (5F–F52).

May 2–6: 5th Administrative Law of Military Installations (Phase I) (5F–F24).

May 9–13: 5th Administrative Law for Military Installations (Phase II) (5F–F24).

May 10–13: 16th Fiscal Law (5F–F12).

May 16–June 3: 26th Military Judge (5F–F33).

May 16–27: 96th Contract Attorneys (5F–F10).

May 16–20: 11th Methods of Instruction.

June 6–10: 71st Senior Officer Legal Orientation (5F–F1).

June 13–17: Claims Training Seminar (U.S. Army Claims Service).

June 20–July 1: JAGSO Team Training.

June 20–July 1: BOAC: Phase II.

July 11–15: 5th Military Lawyer's Assistant (512–71D/20/30).

July 13–15: Chief Legal Clerk Workshop.

July 18–22: 9th Criminal Trial Advocacy (5F–F32).

July 18–29: 97th Contract Attorneys (5F–F10).

July 25–September 30: 101st Basic Course (5–27–C20).

August 1–5: 12th Law Office Management (7A–713A).

August 15–May 19, 1984: 32nd Graduate Course (5–27–C22).

August 22–24: 7th Criminal Law New Developments (5F–F35).

September 12–16: 72nd Senior Officer Legal Orientation (5F–F1).

October 11–14: 1983 Worldwide JAG Conference.

October 17–December 16: 102nd Basic Course (5–27–C20).

3. Civilian Sponsored CLE Courses

August

2–3: PLI, Environmental Law and Practice, Los Angeles CA.

30–31: PLI, Environmental Law and Practice, New York, NY.

September

12–16: NCDA, The Prosecutor and the Juvenile and Family Court, Reno, NV.

23–24: NPI, Minnesota Environmental Law, Minneapolis, MN.

24–25: NPI, Supreme Court Review and Constitutional Law, Washington, DC.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486

AKBA: Alaska Bar Association, P.O. 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone: (202) 965-3500.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, D.C. 20037.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCH: Commerce Clearing House, Inc., 4025 W. Peterson Avenue, Chicago, IL 60646.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State Univeristy Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 68508.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P Street, N.W., Suite 600, Washington, D.C. 20036

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

Current Materials of Interest

1. Regulations.

Number	*Title*	*Change*	*Date*
AR 37-20	Administrative Control of Appropriated Funds	C1	1 Jun 82
AR 135-175	Separation of Officers	901	7 May 82
AR-190-8	Enemy Prisoners of War: Administration, Employment, and Compensation (Supersedes 633-50 of Aug 1963)		1 Jun 92
AR 380-25	Foreign Visitors and Accreditations	C1	15 May 82
AR 600-200	Enlisted Personnel Management System	C1	1 May 82
AR 633-50	Superseded by AR 190-8		
AR 635-200	Personnel Separations, Enlisted Personnel	905	14 May 82
AR 635-200	Personnel Separations, Enlisted Personnel	906	20 May 82
DA Pam 27-9	Military Judges Benchbook		1 May 82

2. Articles.

Lasseter, Earle F., Colonel, and Thwing, James B, Major, *Military Justice in Time of War*, 68 A.B.A.J. 566 (1982).

Ninth Circuit Survey, *Criminal Law in the Ninth Circuit: New Developments*, 14 Loy. L.A.L. Rev. 469 (1982).

Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 Mich. L. Rev. 1073 (1982).

3. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA published deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJA's who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability some of this material is being made available through the Defense Technical Informa-

tion Center (DTIC). There are two ways an office may get this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Biweekly and cumulative yearly indices are provided users. TJAGSA publications may be identified for ordering purposes through these. Also, recently published titles and the identification numbers necessary to order them will be published in *The Army Lawyer*.

The following publications are in DTIC: (The nine character identifiers beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B063185	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-81-1
AD B063186	Criminal Law, Procedure, Trial/ JAGS-ADC-81-2
AD B063187	Criminal Law, Procedure, Post-trial/JAGS-ADC-81-3
AD B063188	Criminal Law, Crimes & Defenses/ JAGS-ADC-81-4
AD B063189	Criminal Law, Evidence/ JAGS-ADC-81-5
AD B063190	Criminal Law, Constitutional Evidence/ JAGS-ADC-81-6

Those ordering publications are reminded that they are for government use only.

4. Retirement in Lieu of PCS

On 1 June 1982, by virtue of changes to AR 635-100 and AR 635-200, a significant change was effected in the Army policy which permits servicemenbers to retire in lieu of complying with permanent change of station (PCS) instructions. Under the new policy, which applies to all officer and enlisted personnel who receive PCS assignment instructions on or after 1 June 1982, a servicemember must submit the request for reitrement within 30 days after notification of the PCS assignment and must retire within 6 months of receipt of this notification. Under previous authority, the servicemember was afforded a 12 month period following his request for retirement to effect this retirement.

5. Recruiting

a. The Personnel, Plans and Training Office, OTJAG and the Professional Recuriting Office announce the appointment of the following Field Screening Officers (FSO's) for 1982-1983:

NAME	*RANK*	*DUTY ASSIGNMENT*
LASSETER, Earle F.	Col	Ft. Benning, GA
FORYS, Conrad W.	LTC	Ft. Monmouth, NJ
ARTZER, Paul E.	MAJ(P)	Ft. Leavenworth, KS
GIBB, Steven P.	MAJ(P)	Ft. Hamilton, NY
ADAMS, William V.	MAJ	West Point, NY
BRAWLEY, Michael J.	MAJ	Presidio of San Francisco, CA
DECKERT, Raymond R.	MAJ	Ft. Riley, KS
JACKSON, Robert H.	MAJ	Ft. Devens, MA
KEEFE, Thaddeus J.	MAJ	Ft. Sheridan, IL
KESLER, Dickson E.	MAJ	Ft. Benjamin Harrison, IN
LANE, Thomas C.	MAJ	Schofield Barracks, HI
MURRELL, James O.	MAJ	TJAGSA, Charlottesville, VA
MOGRIDGE, James D.	MAJ	Ft. Gordon, GA
PELUSO, Ernest F.	MAJ	TDS, Ft. Bragg, NC
ROBERSON, Gary F.	MAJ	Ft. Leonard Wood, MO
SQUIRES, Malcolm H.	MAJ	Ft. Campbell, KY
THOMAS, John G.	MAJ	West Point, NY
TROMEY, Thomas N.	MAJ	Ft. Huachuca, AZ
WARNER, Ronald A.	MAJ	Ft. Lewis, WA
CORK, Timothy R.	CPT(P)	Ft. Ord, CA
WINTER, Marion F.	CPT(P)	Ft. Buchanan, Puerto Rico
ASHFORD, Richey D.	CPT	Ft. Polk, LA
CAPOFARI, Paul A.	CPT	Ft. Jackson, SC
DAVIS, John G.	CPT	Ft. Hood, TX
FITZPATRICK, John M.	CPT	Ft. Carson, CO
GILLIAM, James H.	CPT	Ft. Dix, NJ
GUARINO, Judith M.	CPT	Ft. Hamilton, NY
HANCOCK, George L.	CPT	Ft. Knox, KY
JENTZER, Lyle D.	CPT	Carlisle Barrcks, PA
MEYER, Jack L.	CPT	TJAGSA, Charlottesville, VA
NEVEU, Michael B.	CPT	Ft. Devens, MA
ODEGARD, Adele M.	CPT	Ft. Campbell, KY

NAME	*RANK*	*DUTY ASSIGNMENT*
REINOLD, Craig L.	CPT	Ft. Sam Houston, TX
SMITH, Robert M.	CPT	Ft. Knox, KY
WILL, Clark B.	CPT	Ft. Sill, OK
WOODRUFF, Joseph A.	CPT	Ft. Benning, GA

b. Effective 29 July 1982, the JAGC Professional Recruiting Office will be staffed by Major Fred E. Bryant as Chief Recruiting Officer, assisted by Captains Karen S. Gillett and Blake D. Morant.

6. Articles for the Army Lawyer

Frequently, attorneys in the field may encounter an interesting legal issue, whether in preparing for trial or drafting pretrial advices, post-trial reviews, or legal opinions, which may be of interest to other military attorneys who face the same issue. These attorneys are encouraged to prepare the fruits of their research for publication in *The Army Lawyer*. Such offerings would be of great benefit to fellow attorneys and will be given prompt attention upon submission.

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:

ROBERT M. JOYCE
Brigadier General, United States Army
The Adjutant General

☆U.S. GOVERNMENT PRINTING OFFICE: 1982: 361-809/111